No. 90-5538-CFX Title: Zakhar Melkonyan, Petitioner
Status: GRANTED v.
Louis W. Sullivan, Secretary of Health and Human Services

Docketed:
August 23, 1990 Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Ohanian,John, Wolfman,Brian

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 23 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Sep 14 1990		Order extending time to file response to petition until October 24, 1990.
5	Oct 23 1990		Order further extending time to file response to petition until November 23, 1990.
6	Nov 23 1990		Brief of respondent Sullivan, Secretary of HH&S in opposition filed.
7	Nov 29 1990		DISTRIBUTED. January 4, 1991
8	Dec 21 1990	X	Supplemental brief of respondent filed.
9	Dec 26 1990	X	Reply brief of petitioner Melkonyan filed.
11	Jan 7 1991		Petition GRANTED.
			**********
12	Feb 6 1991		Joint appendix filed.
13	Feb 25 1991		Brief of petitioner Melkonyan filed.
14	Feb 27 1991		SET FOR ARGUMENT MONDAY, APRIL 15, 1991. (1ST CASE)
16	Mar 21 1991	X	Brief of respondent Sullivan, Secretary of H&HS in opposition filed.
15	Mar 22 1991		CIRCULATED.
17	Apr 2 1991		Record filed.
		*	one vol.-USCA 9.
18	Apr 2 1991	X	Reply brief of petitioner Melkonyan filed.
19	Apr 15 1991		ARGUED.

No. 90-5538

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ZAKHAR MELKONYAN - Petitioner
vs.
MARGARET M. HECKLER, Secretary of Health and Human Services - Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Counsel of Record

ORIGINAL

90-5538

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

ZAKHAR MELKONYAN, Petitioner

v.

MARGARET M. HECKLER
Secretary of Health and Human Services

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Zakhar Melkonyan, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to proceed in the District Court for the Central District of California and the Court of Appeals for the Ninth Circuit.

Petitioner's affidavit in support of this motion is attached hereto.

John Ohanian, Inc.
Counsel for Petitioner

AFFIDAVIT IN SUPPORT OF A MOTION TO PROCEED IN FORMA PAUPERIS

I, Zakhar Melkonyan being first duly sworn, depose and say that I am the petitioner in the above-entitled case, that in support of my Motion for leave to Proceed In Forma Pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and the instructions below relating to my ability to pay the cost of the proceeding in this Court are true.

1. Are you presently employed? Yes____ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and amount of the salary or wages per month which you received.
MAY 1980 100 RUBLES PER MONTH

2. Have you received within the past twelve months any income from a business, profession, or other form of self employment, or in the form of rent payments, interest, dividends or other sources?
Yes X No____

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.
SSI DISABILITY $583.50 PER MONTH

3. Do you own any cash or checking or savings account?
Yes X No____

a. If the answer is yes, state the total value of the items owned. $730.00

4 Do you own any real estate, stocks, bonds, notes, automobil., or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No X

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Zakhar Melkonyan
Zakhar Melkonyan

Subscribed and sworn to before me this 14th day of August 1990

Notary

My commission expires: July 2, 1991.

OFFICIAL SEAL
JERONIMO MERAYO
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires JUL 2, 1991

QUESTIONS PRESENTED

The questions presented are:

1. For the purpose of starting the running of the 30 day period for filing a petition for attorney's fees under the Equal Access To Justice Act (EAJA), (in a case remanded to the Secretary of Health and Human Services), is the "final judgment in the action" the new administrative decision, or is it a subsequent order or judgment of the court.

2. If the "final judgment in the action" is the new administrative decision, should the decision of the court of appeals operate retroactively?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Zakhar Melkonyan respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on January 31, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 895 F.2d. 556 (9th Cir. 1990). (App. 6-10). An earlier opinion, which was withdrawn, is reported at 878 F.2d 1183 (9th Cir. 1989). On May 29, 1990, the Court of Appeals denied the petition for a rehearing and rejected the suggestion for rehearing en banc. (App. 11) the order is unreported. The order of the United States District Court for the Central District of California (App. 1-5) is also unreported.

JURISDICTION

The order and opinion sought to be reviewed was filed on January 31, 1990. A petition for rehearing was denied on May 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. section 2412(d)(1)(A) provides in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Section 2412(d)(1)(B) provides in pertinent part:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement ... stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified.

Section 2412(d)(2)(G) provides in pertinent part:

> "[F]inal judgment" means a judgment that is final and not appealable, and includes an order of settlement...

Title XVI of the Social Security Act, 42 U.S.C. section 1383(c)(3), which relates to petitioner's SSI application, provides in pertinent part:

> The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Title II of the Social Security Act, 42 U.S.C. section 405(g), provides in pertinent part:

> [T]he Secretary shall, after the case is remanded, ... file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

STATEMENT OF THE CASE

This case presents a question as to the timeliness of an application for attorney's fees filed under the EAJA. The underlying litigation involves an application for supplemental security income (SSI) disability benefits under Title XVI of the Social Security Act.

On May 28, 1982, petitioner Zakhar Melkonyan filed an application for SSI disability benefits under section 1614(a)(3)(A), of the Social Security Act, as amended. 42 U.S.C. section 1382c (3)(A). The respondent agency denied the application holding that claimant Melkonyan was not disabled.

On June 8, 1984, petitioner Melkonyan filed a complaint in United States district court under 42 U.S.C. section 1383c(3)(A) which incorporates the provisions of 42 U.S.C. section 405(g) for judicial review of the agency's decisions.

On April 5, 1985, the district court remanded the cause back to the Secretary with the consent of both parties, for further administrative proceedings including consideration of new evidence.

On May 7, 1985, the respondent's Appeals Council issued a decision finding that Mr. Melkonyan was entitled to the SSI benefits for which he had initially applied on May 28, 1982.

The Secretary paid past due benefits to petitioner Melkonyan

on September 11 and 17, 1985, some 130 days later. The calculation of benefits was satisfactory, so that Mr. Melkonyan did not seek further administrative or judicial review.

The Secretary did not file the new record, findings, or decision in the district court as required by 42 U.S.C. section 405(g). On May 19, 1986, Mr. Melkonyan filed an application in district court for an award of EAJA attorney fees. The Secretary opposed the application on the grounds that Melkonyan was not a "prevailing party," and that even if he were, the agency's position was substantially justified.

The district court denied the EAJA application on February 18, 1987, for the sole reason that the agency's position had been substantially justified. (App. 1-5).

Petitioner Melkonyan then appealed the EAJA denial to the United States Court of Appeals for the Ninth Circuit which without reaching the issue of substantial justification, sua sponte instructed the district court to dismiss the EAJA application as untimely. On June 30, 1989, the circuit court filed its order and opinion dismissing the appeal on the ground that petitioner's EAJA application had not been filed timely. The court held that the agency's letter to Melkonyan computing and awarding his past due benefits pursuant to the Appeals Council's decision, was the "final judgment" in the action triggering the running of the 30 day period. On July 13, 1989, petitioner filed a petition for rehearing en banc and on January 31, 1990, the circuit court dismissed the cause for lack of subject matter jurisdiction.

On February 12, 1990, petitioner once more filed a petition for rehearing en banc, and on May 29, 1990, the circuit court issued an order (App. 11) denying rehearing and rejected the suggestion for rehearing en banc. The Ninth Circuit thus held that petitioner's application for EAJA attorney's fees should have been filed within 30 days of May 7, 1985, the date of the Appeals Council's new administrative decision.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS SQUARELY WITH DECISIONS OF THE THIRD, FOURTH, AND ELEVENTH CIRCUITS

The decision below conflicts with other circuits on an important question of federal procedure. The Ninth Circuit held in this instance that the federal courts need no longer comply with 42 U.S.C. section 405(g), which provides in pertinent part, the "Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based," whereupon the court may issue its judgment.

The Third, Fourth, and Eleventh Circuits explicitly disagree. Brown v. Secretary of HHS, 747 F.2d 878, 884-85 (3rd Cir. 1984); Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983); Taylor v. Heckler, 778 F.2d 674, 677 (11th Cir. 1985). These circuits agree that upon a new determination by the agency that the

claimant is entitled to benefits, the Secretary will return to the district court pursuant to section 405(g), and file an appropriate motion for disposition. Whereupon, the district court then may issue a dispositive order and/or judgment affirming, modifying, or reversing the Secretary's decision.

The decision by the court below acknowledged the Guthrie decision, but found that it had been legislatively overruled. The court noted that Guthrie had been decided before the 1985 amendments to the EAJA, which redefined the term "final judgment" as "a judgment that is final and not appealable." Melkonyan, 895 F.2d at 559, quoting 28 U.S.C. section 2412(d)(2)(G). The Ninth Circuit decided that Guthrie was inconsistent with the amended language of the statute, and thus, refused to follow the Fourth Circuit's holding. The court's conclusion, however, clearly appears erroneous in light of the legislative history of the 1985 amendments to the statute.

The legislative history of the 1985 amendments to the EAJA explicitly follows the Fourth Circuit's holding in Guthrie. The legislative history states that neither the judicial remand to the agency nor the agency decision after remand constitutes final judgment. H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1 at 19-20 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 132, 148 (1985), citing Guthrie. Had Congress intended to overrule Guthrie, it clearly would not have cited Guthrie with approval in the legislative history. In fact, the legislative history clearly implies that Congress intended that the courts continue to follow

Guthrie.

In addition, the legislative history to 28 U.S.C. 2412 (d)(2)(G) states "[t]his section should not be used as a trap for the unwary resulting in the unwarranted denial of fees." Id. at 146 n.26. Obviously, a result contrary to the legislative history would present a trap for the unwary who relied on its authority when filing for attorney's fees.

B. THE DECISION BELOW DIFFERS WITH THIS COURT'S RECENT DECISION IN SULLIVAN v. HUDSON

This Court's decision in Sullivan v. Hudson, 109 S.Ct. 2248, 2255 (1989), cites with approval Guthrie's holding, that a "final judgment" requires district court action before a civil action is concluded following a remand. The principle from Guthrie which this Court approved, is the same principle that the court below found "troublesome." The decision below discontinues the post-remand "additional action" in the district court which was mandated by Guthrie, and noted in Hudson with approval.

In Sullivan v. Hudson, 109 S.Ct. 2248, 2255 (1989), this Court held:

> [T]he EAJA provides that an application for fees must be filed with the court "within thirty days of final judgment in the action." 28 U.S.C. section 2412(d)(1)(B) (1982 ed., Supp. V). As in this case, there will often be no final judgment in a claimant's civil action for judicial review until the administrative proceedings on remand are complete. See Guthrie v. Schweiker, 718 F.2d 104, 106 (CA 4 1983). ("[T]he procedure set forth in 42 U.S.C. section 405(g) contemplates additional action both by the Secretary and a district court before a civil action is concluded following a remand"). The Secretary concedes that a remand order from a district court to the agency is not a final determination of the civil action and that the district court retains jurisdiction to review any determination rendered on remand." Brief for petitioner 16-17.

In applying the holding in Guthrie to the present case, it is clear that a "final judgment" has not yet been rendered. Both Guthrie and the legislative history to 28 U.S.C. section 2412(d)(2)(G) require the district court to enter a "final judgment" after the decision of the Appeals Council, after which the filing period for attorneys' fees will start to run. Before a district court can enter "final judgment" in any case, the Secretary must file with the court those documents required by 42 U.S.C. section 405(g). The court will then review those documents and enter its "final judgment," after which the plaintiff may file his motion for attorney's fees under the EAJA.

A basic premise of the circuit court is erroneous because the panel believed that the district court would not have jurisdiction to enter final judgment on the merits of this case, since neither party disagreed with the new administrative decision. Thus, the panel concluded that some prior administrative event must have triggered the 30 day time limit for filing the EAJA application. The court believed that the rule in Guthrie would necessitate wasteful sua sponte review of the merits of the Secretary's new decision.

An accurate reading of Hudson, Guthrie, and numerous federal court cases dealing with this issue, clearly establishes that full judicial review of the merits of the disability claim is not only not necessary, but that the courts do not perform such review in day-to-day practice. If both parties are satisfied with

the agency's new decision, the district court merely enters a short order and/or judgment affirming the Secretary's decision.

Hudson and Guthrie only call for "additional action" by the court and not sua sponte review of the merits. In practice, this requires the district court judge to merely sign an order and/or judgment prepared by counsel for either party. The court in Tripodi v. Heckler, 100 F.R.D. 736 (E.D.N.Y. 1984), described the day-to-day practice of the district courts, saying, "[a]fter the Secretary reaches a decision on remand, the government generally either renews its motion for summary judgment, or moves to dismiss the complaint as moot. Only after the district court disposes of the case can the case be appealed. The result should be the same under the Equal Access To Justice Act. The thirty-day time period begins to run when the final order is entered in the district court dismissing the case."

C. THE DECISION BELOW DIFFERS WITH THIS COURT'S RECENT DECISION IN SULLIVAN v. FINKELSTEIN

The decision of the court below is also inconsistent with this Court's recent decision in Sullivan v. Finkelstein, 110 S.Ct. 2659 (1990). In Finkelstein, at pp. 2664-2665, this Court discussed 42 U.S.C. section 405 (g), and analyzed each sentence of the statute's remand provisions. This Court held that there are two different types of remand under 42 U.S.C. section 405 (g), (fourth sentence and sixth sentence remands), with resulting different procedures and results.

This Court explained in Finkelstein that in a sentence six

remand, the district court may remand for the taking of additional evidence, but only upon a showing that there is new evidence that is material and there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.

Remand of the instant case was a sentence six remand, since petitioner had furnished new evidence to the district court and the respondent filed a motion for voluntary remand for further administrative proceedings on December 18, 1984. On April 3, 1985, the district court remanded the cause to the respondent for further administrative proceedings.

The decision in Finkelstein, at p. 2664, explains that in a sentence six remand, the district court may review "[s]uch additional or modified findings of fact," and that such remand requires that "the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision." Pursuant to sentence seven, the "additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. And, under sentence eight, "[t]he judgment of the court shall be final." (See also footnote 8, at p. 2665).

Thus, this Court explained that in a sentence six remand, 42 U.S.C. section 405(g) requires that after a district court remand, the respondent Secretary must file "additional findings of fact or decision," whereupon the district court will issue its

final judgment. Consequently, it is apparent that the decision in this case by the court below is contrary to this Court's decision in Finkelstein.

D. THE DECISION BELOW WILL INCREASE THE "SECOND LITIGATIONS" BETWEEN CLAIMANTS AND THE SECRETARY WITH RESPECT TO THE ISSUE OF TIMELINESS OF FILING EAJA APPLICATIONS

Fully 92% of all EAJA applications filed in the district courts are against the respondent Secretary; nearly all relate to cases involving Social Security claims. The claimants win 90% of the applications against the Secretary, and the average award is less than $3,000.1/

Many of these EAJA applications arise in cases where the court remanded the cause to the Secretary. Social Security statistics show that almost three times as many claimants are awarded benefits by administrative decision after court remand than by outright court reversal.2/

1/ Data from Fiscal Year 1989. Of 411 applications filed against the Secretary, fees were awarded in 369. See Report of the Director of the Administrative Office of the United States Court on Requests for Fees and Expenses Under the Equal Access To Justice Act, reprinted in Annual Report of the Director of the Administrative Office of the United States Courts 1989.

2/ While 5,135 Social Security claimants obtained favorable decisions from the agency after court remand, 1,893 obtained favorable decisions directly from court reversals in Fiscal Year

Efficient judicial handling of these relatively small claims requires a clear rule about timeliness which the affected claimants, their attorneys, the respondent Secretary, and the courts may follow consistently in all Social Security EAJA applications. Unfortunately, the decision below demonstrates that the Secretary has terminated his compliance with 42 U.S.C. section 405(g), and he no longer follows his publicly declared policy and practice as historically understood by the practicing bar.

In 1984, the Secretary told the Court of appeals for the Third Circuit that "should a claimant receive benefits upon remand, the case must still return to the district court for a final judgment." Further, the Secretary represented to the court that "the Secretary will return to the district court and file a copy of any remand proceeding in which a claimant receives benefits." Brown, supra, 747 F.2d at 884 [emphasis in original].

The Secretary recently advised this Court of the same policy and practice in Finkelstein:

> Of course, where the court has remanded the cause to the Secretary for a rehearing because it has found the Secretary's first decision denying benefits to have been unlawful, it is appropriate for the Secretary to file any new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA. See Sullivan v. Hudson, 109 S.Ct. at 2255.

Brief for Petitioner in Sullivan v. Finkelstein, No. 89-504, at 44, n. 35.

There should be no question that this long standing practice

1989. Office of Hearings and Appeals, Office of Civil Actions, Social Security Administration.

for complying with 42 U.S.C. section 405(g) in the EAJA context, has been and continues to be the required standard for compliance with the law. The decision below, holding that post remand judicial proceedings are not required, thus conflicts with the Secretary's own statement made recently in Sullivan v. Finkelstein.

Until now, only a few EAJA applications per year have been denied due to untimely filing of applications.3/ Unfortunately, with the decision below, it now appears the Secretary will litigate nationally the timeliness of all EAJA applications which were filed more than 30 days after the new agency decision. This policy change will create technical "second litigations" by the Secretary in many small EAJA claims brought by disabled and vulnerable beneficiaries.

E. IF THE "FINAL JUDGMENT IN THE ACTION" IS THE NEW AGENCY DECISION, THE NINTH CIRCUIT'S DECISION SHOULD NOT APPLY RETROACTIVELY, BUT SHOULD ONLY OPERATE PROSPECTIVELY

The Ninth Circuit should have invoked its equity powers in order to prevent injustice to hundreds if not thousands, of social security claimants and attorneys who were caught in a trap for the unwary by the court's unexpected decision overturning Guthrie, and its progeny of cases, in holding that federal courts no longer need to comply with 42 U.S.C. section 405(g) of the Social Security Act.

3/ Administrative Office of U.S. Courts, supra n. 1 (13 timeliness denials out of 501 applications in FY 1989).

The court in Brown v. Secretary of HHS, 747 F.2d at 885, stated in its decision of November 23, 1984, that should the Secretary fail in the future to follow his historical procedure of notifying the district court after completion of a remand, so that the district court would then enter the final judgment contemplated by the EAJA, "we note that remanding courts are vested with full equity powers, and may adjust their relief to reflect such changed circumstances. See e.g., Ford Motor Co. v. NLRB, 305 U.S. 364, 373, 59 S.Ct. 301, 306, 83 L.Ed. 221 (1939) (remanding court 'may adjust its relief to the exigencies of the case in accordance with equitable principles ... to secure a just result')." Continuing, the court pointed out that equitable tolling of the statute of limitations is permissable, citing Northern Metal Co. v. United States, 350 F.2d 833, 837 (3rd Cir. 1965). See also Bowen v. City of New York, 476 U.S. 467, 480-482 (1986). (Tolling the period to seek review under section 405(g).). Thus, the court below should have equitably tolled the triggering of the 30 days for petitioner Melkonyan and other claimants similarly caught in a trap for the unwary.

Even if this Court accepts the decision of the Ninth Circuit in this case as a new rule of law overruling Guthrie, and its progeny, the decision by the court below should not be permitted to apply retroactively. This Court has held that to be applied nonretroactively, a judicial decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first im-

pression whose resolution was not clearly foreshadowed. Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 296 (1971).

It is apparent that the Ninth Circuit's decision in this case establishes a new rule of law which overrules clear past precedent relied upon by the petitioner and many other claimants and their attorneys to their detriment, so that the decision of the court below should have been applied prospectively.

CONCLUSION

Petitioner Melkonyan respectfully requests that a writ of certiorari issue.

Respectfully submitted,

John Ohanian, Inc.

John Ohanian, Inc.
Counsel of Record for Petitioner
A Professional Corporation

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

ZAKHAR MELKONYAN, Petitioner

v.

MARGARET M. HECKLER, Secretary of Health and Human Services,

Respondent

PROOF OF SERVICE

I, John Ohanian, do swear that on this date, August 22, 1990, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The name and address of the party served is as follows:

Solicitor General, Department of Justice, Washington, D.C. 20530.

John Ohanian Affiant

Subscribed and Sworn to Before Me
this 22nd day of August 1990.

Notary Public in and for Los Angeles
County and State of California

OFFICIAL SEAL
ARLINE R. SHEARER
Notary Public California
Principal Office in
Los Angeles County
My Comm Exp Apr 18, 1991

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONIAN, Plaintiff, v. MARGARET M. HECKLER, SECRETARY OF HEALTH and HUMAN SERVICES, Defendant.	NO. CV 84-4317-MRP(K) FINDINGS ON AN APPLICATION FOR ATTORNEY'S FEES

These findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court of the Central District of California.

On June 8, 1984, plaintiff by counsel filed this complaint seeking review of the decision of the Secretary denying social security benefits. 42 U.S.C. § 405(g). The Magistrate ordered further proceedings and on October 18, 1984, plaintiff filed a motion for summary judgment. Defendant filed its cross motion on November 20th. Plaintiff filed a reply brief on December 4th to which defendant filed a supplemental memorandum

on December 18t. indicating that the Secret .y was granting a voluntary remand. On December 27, 1984, plaintiff filed objections to the motion for voluntary remand seeking a decision on the merits. On April 1, 1985, plaintiff withdrew his objections and the matter was subsequently remanded by order of the court. On May 7th, the Secretary issued a favorable decision. (Deft. Oppo. Exh. A.)

Plaintiff now seeks attorney's fees under the Equal Access to Justice Act. 28 U.S.C. § 2412(d).

A prerequisite to an award of fees and expenses under the Equal Access to Justice Act is a finding by the court that the position of the United States was not substantially justified and that there are no special circumstances making such an award unjust. 28 U.S.C. § 2412(d)(1)(A). In addition, the application must be filed within 30 days of final judgment. § 2412(d)(1)(B).

The evidence of the favorable award before the court indicates that the plaintiff who had filed his first application for benefits on May 28, 1982 filed a second application on May 30, 1984 and "[o]n the basis of evidence obtained in connection with the second application, the Disability Determination Service ("DDS") of the State of California determined that the claimant is limited to medium work and that, . . . Rule 203.10 of Table 3, . . . directs a finding that the claimant has been disabled since May 30, 1984." The award goes on to state that the determination "was based on a report of pulmonary function studies which were conducted on April 25, 1984, and an opinion by a physician designated by the Secretary dated June 7, 1984, ..."

The Secretary t n made a finding that the laintiff had been disabled since May 26, 1982 "based on the application filed on May 26, 1982, . . ." (Defendant's Oppo., Exh. A.)

It appears from the record before the court that the Secretary reconsidered plaintiff's claim based upon new evidence.[1/] Therefore this award is not a basis for finding that his original position was not "substantially justified."

The Magistrate has reviewed the administrative record submitted to the Secretary in support of the original application and finds that it does not justify a finding that the original decision of the Secretary denying benefits was substantially unjustified. The medical reports in that record do not indicate disability as defined under the Act. (Admin. Rec. pp. 42-43, 92-96.)[2/]

1/ See Plaintiff's Memo in Support, filed October 18, 1984, Exh. A.

2/ 20 C.F.R. 404.1520(c) was declared invalid by the Ninth Circuit on September 10, 1985. Yuckert v. Secretary, 774 F.2d 1364 (9th Cir. 1985). This was based on a finding that it was inconsistent with 42 U.S.C. 423(d)(2)(A) of the Social Security Act. A similar statute governs Supplemental Security Income (SSI), 42 U.S.C. 1382c(a)(3(B). The Secretary's first decision applied 20 C.F.R. 416.920(c) which insofar as material here, is identical with 404.1520(c). The Yuckert decision came some 17 months after the final decision of the Secretary in the instant case (April 9, 1984). The Magistrate believes that the latter was substantially justified under a reasonable interpretation of the the regulations then in effect.

It is the conclusion of the Magistrate that it cannot be said from the evidence of record that the position of the government was not substantially justified.

IT IS THEREFORE RECOMMENDED that the Court enter an Order denying the request for fees.

DATED: This 12th day of February, 1987.

JOHN R. KRONENBERG
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONYAN, Plaintiff, v. MARGARET M. HECKLER, SECRETARY OF HEALTH and HUMAN SERVICES, Defendant.	NO. CV 84-4317-MRP(K) JUDGMENT DENYING ATTORNEY'S FEES

IT IS ADJUDGED that the request for attorney's fees is denied.

DATED: This 17 day of February, 1987.

MARIANA R. PFAELZER
United States District Judge

Zakhar MELKONYAN, Plaintiff-Appellant,

v.

Margaret M. HECKLER, Secretary of HHS, Defendant-Appellee.

No. 87-5716.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 10, 1989.

Submission Withdrawn March 22, 1989.

Resubmitted April 5, 1989.

Decided Jan. 31, 1990.

Successful applicant for supplemental security income (SSI) benefits sought to recover attorney fees and costs under the Equal Access to Justice Act. The United States District Court for the Central District of California, Mariana R. Pfaelzer, J., entered order denying application, on ground that position taken by Secretary of Health and Human Services in originally denying benefits was "substantially justified." Appeal was taken. The Court of Appeals, Wallace, Circuit Judge, held that time limit on claimant's application for attorney fees and costs under the EAJA began to run immediately upon decision of appeals council, so that application should have been dismissed as untimely.

Vacated and remanded.

1. United States ⇐147(6)

Statutory time limit on applications for attorney fees and costs under the Equal Access to Justice Act is jurisdictional in nature. 28 U.S.C.A. § 2412(d)(1)(B).

2. United States ⇐147(6)

District court order remanding plaintiff's action for supplemental security income (SSI) benefits to appeals council was not "final judgment," such as would trigger 30-day time limit on application for attorney fees and costs under the Equal Access to Justice Act. 28 U.S.C.A. § 2412(d)(1)(B).

See publication Words and Phrases for other judicial constructions and definitions.

3. United States ⇐147(6)

Time limit on social security claimant's application for attorney fees and costs under the Equal Access to Justice Act began to run immediately upon decision of appeals council, where appeals council determined that claimant was disabled as of disability onset date alleged in original application. 28 U.S.C.A. § 2412(d)(1)(B).

John Ohanian, John Ohanian, Inc., Los Angeles, Cal., for plaintiff-appellant.

Michael R. Power, Assistant Regional Counsel, Dept. of Health and Human Services, San Francisco, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before WALLACE, CANBY and TROTT, Circuit Judges.

ORDER

The opinion filed in the above case on June 30, 1989, is withdrawn.

OPINION

WALLACE, Circuit Judge:

Melkonyan appeals from the district court's judgment denying his application for attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Melkonyan challenges the court's conclusion that the position taken by the Secretary of Health & Human Services (Secretary) was "substantially justified." Because Melkonyan's EAJA application was not filed within the jurisdictional time limit, we vacate the judgment and remand for dismissal by the district court.

I

On May 28, 1982, Melkonyan filed an application for supplemental security income (SSI) disability benefits under Title XVI of the Social Security Act (Act). 42 U.S.C. §§ 1381 *et seq.* The application was denied. After a hearing, an administrative law judge (ALJ) again denied the application, determining that Melkonyan was not disabled within the meaning of the Act. The Appeals Council affirmed the ALJ's decision on April 9, 1984. On June 8, 1984, Melkonyan filed a complaint in district court seeking review pursuant to 42 U.S.C. § 1383(c)(3), which incorporates the judicial review provisions of 42 U.S.C. § 405(g).

Meanwhile, on May 30, 1984, Melkonyan filed a new application for SSI disability benefits supported by new evidence of disability. He learned on August 9, 1984, that this application was approved.

On October 18, 1984, Melkonyan filed a motion in district court for summary judgment, which included the new evidence of his disability. The Secretary offered and Melkonyan refused a stipulated remand for further administrative proceedings. The Secretary then moved for a court-ordered remand pursuant to 42 U.S.C. § 405(g), which Melkonyan initially opposed and then supported. On April 5, 1985, the district court entered its order to remand.

On May 7, 1985, the Appeals Council vacated the ALJ's decision rejecting Melkonyan's original application, and determined that he was disabled as of the date of his original application. The determination of Melkonyan's benefits occurred on September 11, and he was paid on September 17, 1985. Melkonyan sought no further administrative or judicial review in connection with the award of benefits.

On May 19, 1986, Melkonyan filed a motion in district court for attorneys' fees and costs in a civil action against the United States pursuant to the EAJA, 28 U.S.C. § 2412(d). The Secretary opposed on the grounds that Melkonyan was not a "prevailing party," and that even if he were, the government's position had been "substantially justified." The court denied Melkonyan's request, holding that the government's position had been substantially justified. This appeal followed.

II

[1] 28 U.S.C. § 2412(d)(1)(A) provides that a party prevailing in a suit against the United States or one of its agencies should receive attorneys' fees, costs, and other expenses incurred in the civil action "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.* A party requesting such an award must submit an application to the court "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). The 30-day time limit is jurisdictional. *See Papazian v. Bowen*, 856 F.2d 1455, 1455-56 (9th Cir.1988) (*Papazian*); *Barry v. Bowen*, 825 F.2d 1324, 1327-29 (9th Cir. 1987); *see also MacDonald Miller Co. v. NLRB*, 856 F.2d 1423, 1424 (9th Cir.1988) (so construing 30-day time limit in another section of the EAJA); *Columbia Manufacturing Corp. v. NLRB*, 715 F.2d 1409, 1410 (9th Cir.1983) (same). Final judgment in this context means "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G). This definition applies to Melkonyan's case, which was pending when the definition was revised by amendments to the EAJA on August 5, 1985. Equal Access to Justice Act, Extension and Amendment, Pub.L. No. 99-80 § 7(a), 99 Stat. 183, 186 (1985) (EAJA Extension Act); *see McQuiston v. Marsh*, 790 F.2d 798, 800 (9th Cir. 1986) (*McQuiston II*).

We must first consider the threshold jurisdictional question whether Melkonyan submitted his request within 30 days of final judgment, as defined by the EAJA Extension Act. The problem lies in identifying the relevant "judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G). We interpret the EAJA de novo. *Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir.1988).

[2] The district court order remanding to the agency for further administrative proceedings was not a final judgment for purposes of 28 U.S.C. § 2412(d)(1)(B). *Papazian*, 856 F.2d at 1455-56. There, an ALJ rejected Papazian's application for dis-

ability benefits under Title II of the Social Security Act on the grounds that Papazian was not disabled. *Id.* at 1455. The Appeals Council affirmed by denying review. *Id.* Papazian sought judicial review, but while his complaint was pending in district court, the parties agreed to a court order remanding for "further administrative proceedings." *Id.* at 1455–56. On remand, the Appeals Council found Papazian disabled and awarded him benefits. The district court concluded that Papazian's subsequent petition for fees was untimely because the 30 days since the remand order had expired. *Id.*

We reversed because neither the parties nor the district court intended the remand to end the litigation, particularly in light of the reference to "further administrative proceedings." *Id.* at 1456. Similarly, both parties here expected further administrative proceedings to follow the remand. Thus, the district court order of remand was not a "judgment that is final and not appealable" and therefore did not trigger the 30–day period. *See also Swenson v. Heckler*, 801 F.2d 1079, 1080 (9th Cir.1986) (holding that claimant who obtains order of remand not entitled to EAJA fees, but basing decision on "prevailing party" rather than "finality"); *Singleton v. Bowen*, 841 F.2d 710, 711–12 (7th Cir.1988) (same).

In *Papazian*, after the Appeals Council awarded the claimant benefits, the district court adopted the decision and entered it as its own judgment. 856 F.2d at 1455. We looked to this district court judgment, rather than the Appeals Council's award of benefits on remand, in determining what constituted the final judgment for purposes of section 2412(d)(1)(B). *Id.* at 1455–56. Here, however, the district court entered no such judgment. We are faced with a problem not confronted by us in *Papazian*: If the remand order lacks finality, and there is no subsequent district court order, what event triggers the 30–day time limit prescribed by 28 U.S.C. § 2412(d)(1)(B)? We are forced to resolve this problem because our jurisdiction rests on its outcome.

Pursuant to 28 U.S.C. § 2412(d)(1)(B), the 30–day time limit is triggered by a "final judgment in the action." Section 2412(d)(2)(G) goes on to define a "final judgment" as "a judgment that is final and not appealable." On May 7, 1985, the Appeals Council vacated the ALJ's original decision rejecting Melkonyan's application, and determined that he was disabled as of the disability onset date that he alleged in his original application. We must determine whether this decision constituted a "final judgment" within the meaning of section 2412(d)(2)(G) and triggered the 30–day period for seeking EAJA fees under section 2412(d)(1)(B).

[3] As we held in *McQuiston II*, the 30–day period does not begin to run until the time to appeal expires. 790 F.2d at 800. Ordinarily, this means that the 30–day period will start 65 days after the date on the notice of the Secretary's determination of eligibility for benefits. *See* 20 C.F.R. §§ 416.1401, 1481, 1483 (1988) (60 days to seek district court review of the Appeals Council decision, plus 5 days between date of notice and date notice deemed received). However, where, as here, the Secretary determines that the claimant was disabled as of the disability onset date that the claimant alleged in his original application, the 30–day period begins to run immediately upon the decision of the Appeals Council. This rule is appropriate because the Secretary's decision is "not appealable" by either the claimant or the Secretary. We do not need to address the question of when the Secretary's remand decision which is either partially favorable or unfavorable to a claimant becomes a final judgment.

The decision by the Appeals Council constitutes the final decision of the Secretary. *Sullivan v. Hudson*, — U.S. —, 109 S.Ct. 2248, 2252, 104 L.Ed.2d 941 (1989). Section 405(g) entitles only an "individual" to appeal the Secretary's decision. *Jones v. Califano*, 576 F.2d 12, 18 (2d Cir.1978). Thus, the Secretary would not have standing or reason to complain of his own final decision. Likewise, if a claimant wholly prevails on his claim, he would have no reason to appeal that decision.

We, therefore, conclude that the "final judgment" in Melkonyan's action was rendered on May 7, 1985. But Melkonyan did not move for EAJA fees until more than one year after this "final judgment." The district court therefore lacked subject matter jurisdiction to entertain his application. 28 U.S.C. § 2412(d)(1)(B); *Papazian*, 856 F.2d at 1455–46. Accordingly, we do not reach the question whether the government's position was substantially justified. Instead, we vacate and remand to the district court for dismissal.

In making our decision, we are confronted with what appears to be a different approach to this problem by a sister circuit. In *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir.1983) (*Guthrie*), the Fourth Circuit ordered the district court to direct the Secretary to make the filing 42 U.S.C. § 405(g) describes. *Id.* at 106. After this filing, the Fourth Circuit directed the district court to enter a final judgment so that the section 2412(d)(1)(B) 30–day period would begin. *Id.*; *accord Brown v. Secretary of Health & Human Services*, 747 F.2d 878, 884–85 (3d Cir.1984); *see also* H.R.Rep. No. 120, 99th Cong., 1st Sess., pt. 1 at 19–20 (1985), *reprinted in* 2 1985 U.S.Code Cong. & Admin.News 132, 148 (legislative history of 1985 amendments to EAJA stating that neither remand to agency nor agency decision after remand constitutes final judgment; approving *Guthrie* and *Brown* holdings that district court order after Secretary makes required post-remand filing constitutes "final judgment" triggering 30–day period).

Guthrie's approach is troublesome. While section 405(g) requires the Secretary to file the new decision and findings after remand, it does not confer upon the district court any independent power to review the post-remand filing. The agency's decision may be reviewed by the district court only if a claimant appeals within the 60–day time limit. *See* 42 U.S.C. § 405(g); 20 C.F.R. §§ 416.1401, 1481 (1988). The Secretary's post-remand decision is reviewable only to the extent that the agency's original decision and findings were reviewable. 42 U.S.C. § 405(g). Unless the ordinary procedural requirements for judicial review of an agency decision are met, we are at a loss to find a basis for the district court to enter any order or judgment affirming, modifying, reversing or remanding the Secretary's post-remand filing. Nor do we see any advantage to such an approach. Established procedures already allow a claimant dissatisfied with the Secretary's decision on remand to secure judicial review. 20 C.F.R. §§ 416.1401, 1481 (1988). In such a case, the section 405(g) requirement that the Secretary furnish the findings, decision, and record supplements the claimant's appeal. If the Secretary's decision is wholly in favor of the claimant, we are hard pressed to see a need for the overburdened district courts to deploy scarce judicial resources in a sua sponte "affirmation" of uncontested eligibility decisions.

More importantly, *Guthrie* was decided before the 1985 EAJA amendment which effectively redefined "final judgment" as "a judgment that is final and not appealable." *See* 28 U.S.C. § 2412(d)(2)(G); *McQuiston II*, 790 F.2d at 800. *Guthrie* explicitly relied on the "common usage" definition of final judgment articulated in *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir.1983), which *McQuiston II* held had been overruled by the 1985 amendment. *McQuiston II*, 790 F.2d at 800; *Guthrie*, 718 F.2d at 106. The Fourth Circuit assumed that final judgment meant the type of judgment provided under Fed. R.Civ.P. 54, a judgment only a court could enter. 718 F.2d at 106. Thus, only a court's judgment could be a final judgment triggering the 30–day period to submit an application for EAJA fees. *Id.* The revised statute, aside from its use of the term "judgment," gives us no reason to think that this is so. *See* 28 U.S.C. §§ 2412(d)(1)(B) & (d)(2)(G). It does not appear, therefore, that we should interpret "judgment" in this context as requiring a judgment by a court. For these reasons, we do not remand this case ordering the district court to enter a final judgment with the thought that the section 2412(d)(1)(B) 30–day period would begin.

Our approach not only sets definite limits for purposes of finality, but it also benefits

individuals seeking EAJA awards under section 2412 in similar circumstances. Rather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district court, such individuals may seek EAJA awards as soon as the agency's action on remand becomes a "final judgment" under section 2412(d)(2)(G).

We therefore vacate the judgment of the district court and remand this case for dismissal for lack of subject matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

1. Statutes ⇐223.2(1)

Complementary provisions of Title VII and Age Discrimination in Employment Act are to be construed consistently. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

2. Civil Rights ⇐169

Deputy city attorney was excluded from coverage under Age Discrimination in Employment Act (ADEA) as member of personal staff of elected city attorney, even though he was not personally entrusted with great deal of responsibility, since he was placed in public eye as representative of city attorney's office, was empowered to exercise legal authority of that office and held office at "pleasure" city attorney rather than subject to city's civil service laws. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 11(f), 29 U.S.C.A. §§ 621 et seq., 630(f); West's Ann.Cal.Gov.Code § 1301.

Raymond E. MONCE, Plaintiff-Appellant,

v.

CITY OF SAN DIEGO, Defendant-Appellee.

No. 88-6389.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 11, 1990.

Decided Feb. 1, 1990.

Former deputy city attorney brought suit alleging age discrimination in his termination. The United States District Court for the Southern District of California, Howard B. Turrentine, J., dismissed action for lack of jurisdiction. Deputy city attorney appealed. The Court of Appeals, Farris, Circuit Judge, held that position of deputy city attorney was exempt from Age Discrimination in Employment Act under personal staff exception.

Affirmed.

Gordon E. vonKalinowski, San Diego, Cal., on the brief, for plaintiff-appellant.

Michael G. Nardi, Seltzer Caplan Wilkins & McMahon, San Diego, Cal., for defendant-appellee.

John F. Suhre, Washington, D.C., for amicus curiae E.E.O.C.

Raymond Monce, Spring Valley, Cal., pro se.

Appeal from the United States District Court for the Southern District of California.

Before SCHROEDER, FARRIS and NOONAN, Circuit Judges.

FARRIS, Circuit Judge:

This is an appeal from an order dismissing the plaintiff's complaint alleging age discrimination. Raymond Monce, a former deputy San Diego city attorney, alleges that he was constructively discharged from his position because of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. The district court found that Monce was not an employee covered by the ADEA because he was a member of the personal staff of an elected

ORIGINAL

No. 90-5538

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ZAKHAR MELKONYAN, PETITIONER

v.

LOUIS W. SULLIVAN
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in a Social Security case that is remanded to the Secretary for further proceedings, a final, non-appealable administrative decision in favor of the claimant on remand commences the 30-day period in which an attorney's fee application must be filed under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(B).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 6-10) is reported at 895 F.2d 556.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1990, and a petition for rehearing was denied on May 29, 1990. Pet. App. 11. The petition for a writ of certiorari was filed on August 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 28, 1982, petitioner filed an application for disability benefits under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 42

U.S.C. 1381 et seq. An administrative law judge determined after a hearing that petitioner was not disabled within the meaning of the Act, and the Appeals Council denied review. On June 8, 1984, petitioner filed a complaint in district court seeking judicial review of the Secretary's final decision pursuant to 42 U.S.C. 1383(c)(3), which incorporates the judicial review provisions of 42 U.S.C. 405(g). Pet. App. 1, 6-7.

On May 30, 1984, shortly before filing his civil action, petitioner filed a second application for benefits, supported by new evidence of disability. Upon review of this second application, petitioner was found to be disabled as of May 30, 1984. On October 18, 1984, petitioner filed a motion for summary judgment in his action for judicial review of the Secretary's decision denying his first application. That motion was accompanied by the new evidence of disability adduced in the proceedings on his second application. Pet. App. 7.

While the summary judgment motion was pending, the Appeals Council, after reviewing the developments in connection with petitioner's second application, decided that it would accept a voluntary remand of the case for further administrative proceedings. [1] The Secretary offered to stipulate to such a remand, but petitioner's counsel refused to do so. Accordingly,

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[1] Disability benefits may not be paid under the SSI program for any period preceding the date on which an application is filed. 20 C.F.R. 416.501. Thus, in granting petitioner's second application, the Secretary could not award benefits retroactively to the date of petitioner's first application without further consideration of the first application.

on December 18, 1984, the Secretary filed a motion requesting that the court, "in its discretion and pursuant to [petitioner's] prayer for relief in his complaint, order this case be remanded" to the Secretary "for further proceedings." App. A, infra. Although petitioner at first opposed a remand, App. B, infra, he subsequently filed his own motion "for an order remanding this case to the [Secretary]." App. C, infra. In response, the district court entered its "judgment" in the case on April 5, 1985, which stated (App. D, infra):

> Defendant's motion to remand, concurred in by plaintiff, is granted. The matter is remanded to the Secretary for all further proceedings.

Following the remand, the Appeals Council, on May 7, 1985, vacated the ALJ's decision denying petitioner's first application and determined that petitioner had been disabled since the date on which that application was filed (May 28, 1982). App. E, infra; see generally Pet. App. 1-2, 3, 7.

2. More than a year later, on May 19, 1986, petitioner filed an application in the district court for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Pet. App. 7. The magistrate recommended that the fee application be denied, id. at 1-4, concluding that the Secretary's denial of petitioner's first application was "substantially justified" within the meaning of EAJA, 28 U.S.C. 2412(d)(1)(A), because the medical reports in the original record did not indicate that he was disabled. Id. at 3-4. On February 18, 1987, the district court, following the magistrate's recommendation, denied

petitioner's application for attorney's fees. Id. at 5.

3. The court of appeals vacated the district court's judgment denying petitioner's application for attorney's fees on the merits and remanded the case with instructions to dismiss for lack of jurisdiction. Pet. App. 5-10. The court pointed out that under 28 U.S.C. 2412(d)(1)(B), an application for EAJA fees must be filed within 30 days of the "final judgment in the action," a term that is defined as "a judgment that is final and not appealable." Pet. App. 8 (quoting 28 U.S.C. 2412(d)(1)(B) and (d)(2)(G)). Applying that definition, the court held that the Secretary's May 7, 1985, decision following the remand constituted a "final judgment" for purposes of commencing the 30-day filing requirement under EAJA, and that petitioner's application filed on May 19, 1986, therefore was untimely. Pet. App. 8.

In so holding, the court of appeals first concluded that the district court's April 5, 1985, judgment remanding the case to the Secretary could not itself be the "final judgment" for purposes of EAJA, because both parties anticipated further proceedings after the remand. Pet. App. 7-8. The court further noted that there was no other order of the district court that could serve as the "final judgment" for these purposes, since the court did not enter a new judgment (or any other order) after the Appeals Council rendered its decision on remand. Id. at 8.

In these circumstances, the court held that the Secretary's final decision on remand (the Appeals Council's May

7, 1985, decision) must be regarded as the "final judgment" for purposes of commencing the 30-day period for filing a fee application under EAJA. In the court's view, that decision satisfied the statutory requirement of being "final and not appealable" by either party. 28 U.S.C. 2412(d)(2)(G). The court explained that because 42 U.S.C. 405(g) authorizes judicial review only by an "individual" who is aggrieved by the Secretary's final decision after a hearing, "the Secretary would not have standing or reason to complain of his own final decision." Pet. App. 8. "Likewise," the court continued, "if a claimant wholly prevails on his claim, he would have no reason to appeal that decision." Ibid. Because petitioner did not seek EAJA fees until more than a year after the Secretary rendered this "final judgment," the court held that the district court lacked jurisdiction to entertain his application. Id. at 8-9.

The court distinguished Guthrie v. Schweiker, 718 F.2d 104 (4th Cir. 1983), which relied on the language in the sixth sentence of 42 U.S.C. 405(g) that provides for the Secretary to file with the district court his revised findings of fact and decision after a remand covered by that sentence. The Fourth Circuit reasoned in Guthrie that after such a filing, the district court should enter a final judgment, which would commence the running of the 30-day filing period under EAJA. See Pet. App. 9 (citing 718 F.2d at 106).

The court below found the Guthrie approach "troublesome," because 42 U.S.C. 405(g) does not confer upon the district court

any independent power to review the post-remand filing by the Secretary, and because the merits of the Secretary's new decision on remand therefore may be reviewed by the district court only if the claimant seeks judicial review of that decision within 60 days, in the usual manner provided by 42 U.S.C. 405(g). Pet. App. 9. Furthermore, the court below could not "see any advantage to such an approach," because "[i]f the Secretary's decision is wholly in favor of the claimant," there would seem to be no "need for overburdened district courts to deploy scarce judicial resources in a sua sponte 'affirmation' of uncontested eligibility decisions." Ibid. In addition, the court noted that Guthrie was decided before Congress enacted EAJA's definition of the term "final judgment" in 1985. The Fourth Circuit had assumed that that term referred only to an order of the sort a court may enter, as under Fed. R. Civ. P. 54, but the court did not believe that the new version required that the meaning of the term "judgment" be so confined. It therefore held that a "final judgment" for these purposes may also include the final administrative decision of the agency following a remand. Pet. App. 9.

The court of appeals noted that its approach "not only sets definite limits for purposes of finality, but it also benefits individuals seeking EAJA awards under section 2412 in similar circumstances." Pet. App. 9-10. The court explained that "[r]ather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district

court, such individuals may seek EAJA awards as soon as the agency's action on remand becomes a 'final judgment' under section 2412(d)(2)(G)." Pet. App. 10.

ARGUMENT

The court of appeals properly held that, in the context of a remand of a Social Security case to the Secretary for further administrative proceedings, a final decision of the Secretary after the remand that awards benefits to the claimant is a "final judgment" that commences the 30-day period for filing an application for attorney's fees under EAJA. That holding comports with the text and purposes of EAJA and with the analytical framework of this Court's decisions in Sullivan v. Hudson, 109 S. Ct. 2248 (1989), and Sullivan v. Finkelstein, 110 S. Ct. 2658 (1990), which considered the nature of remands under 42 U.S.C. 405(g). As petitioner point out, the decisions of several other courts of appeals previously had suggested a different approach. But the essential premises of those decisions have been shown by Hudson and Finkelstein to be mistaken. There is no post-Finkelstein circuit conflict on the question whether the Secretary's final and non-appealable decision on remand may be regarded as a "final judgment" for purposes of EAJA. The petition for a writ of certiorari therefore should be denied.

1. As relevant here, EAJA provides that "a court shall award to a prevailing party * * * fees and other expenses * * * incurred by that party in any civil action * * * , including

proceedings for judicial review of agency action, brought against the United States * * * , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). Section 2412(d)(1)(B) provides that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and expenses * * * ." The court of appeals correctly held that the Appeals Council's decision after remand, which found petitioner disabled and awarded him all the relief he sought, triggered the 30-day period for filing an application for attorney's fees under EAJA.

First, this interpretation is entirely consistent with the text of EAJA. Section 2412(d)(2)(G), which was added to EAJA as part of the 1985 revision, defines the term "final judgment" as "a judgment that is not appealable, and includes an order of settlement." Nothing in this definition limits a "judgment" for purposes of EAJA to orders entered by a court. Moreover, the ordinary meaning of the term "judgment" is "a formal decision or determination given in a cause by a court of law or other tribunal," Webster's Third New International Dictionary, at 1223 (1986) (emphasis added), a meaning that encompasses a decision by the Appeals Council that terminates all proceedings on an application for benefits.

To be sure, "judgment" also is used as a term of art having special application to judicial proceedings. But in that

setting, a "judgment" typically refers to an order of a court that is appealable. See Fed. R. Civ. Proc. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."); Finkelstein, 110 S. Ct. at 2665 ("appealable" is "a meaning with which 'final' is usually coupled"). The EAJA definition fundamentally departs from that usage by requiring that the order be "final and not appealable." 28 U.S.C. 2412(b)(2)(G). This significant departure from the usual characteristics of a "judgment" entered by a court reinforces the conclusion that Section 2412(b)(1)(B) should not be read implicitly to limit the "final judgment[s]" that trigger the 30-day filing period to orders that have been entered by courts. Cf. Bell v. United States, 462 U.S. 356, 360-361 (1983).

Second, in Hudson, the Court held that in a Social Security case brought under 42 U.S.C. 405(g), the "civil action" for which attorney's fees may be awarded under 28 U.S.C. 2412(b)(1)(A) may include the proceedings before the Secretary following a remand from the district court. The Court relied on its past decisions under other fee-shifting statutes indicating that "where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." 109 S. Ct. at 2255; see also id. at 2257 ("administrative proceedings may * * * be considered part of the 'civil action' for purposes of a fee award"). Accord,

Commissioner of INS v. Jean, 110 S. Ct. 2316, 2320-2321 (1990) (citing Hudson)(EAJA "favors treating a case as an integrated whole, rather than as atomized line-items").

As noted above, the operative language here requires a party to file his EAJA application "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)(1)(B). Since, as held in Hudson, the concept of the "civil action" in this setting may extend to the administrative proceedings following a remand by the district court, the "final judgment" in such a civil action similarly may extend to the decision of the Secretary that terminates those administrative proceedings on remand. Specifically, as the court of appeals held (Pet. App. 8), where the Secretary's decision following the remand finds the claimant disabled and awards him all the benefits he seeks, that decision is "final and not appealable" by either the claimant or the Secretary. See 28 U.S.C. 2412(d)(2)(G). Such a decision of the Secretary therefore terminates not only the administrative proceedings themselves, but also the overall "civil action," of which those proceedings on remand are the last stage. The decision of the Secretary therefore is the "final judgment in the [civil] action," which commences the running of the 30-day period for filing an EAJA fee application under 28 U.S.C. 2412(d)(1)(B).

Finally, the holding below is consistent with Congress's purpose to fix a definite time limitation on the filing of fee applications. A decision on remand that is favorable to the claimant effectively ends the underlying litigation and

immediately enables the reviewing court to determine whether the claimant is a prevailing party for purposes of EAJA. As such, the administrative decision on remand is "final" in every respect relevant to the determination of a claimant's entitlement to fees. Hudson, 109 S. Ct. at 2255. A construction that would nonetheless make resolution of the attorney's fee issue contingent upon completion of additional (yet pointless) procedural steps in the district court would invite needless and potentially indefinite delay in the resolution of fee questions -- a result that is plainly at odds with the 30-day time limit on fee applications that Congress prescribed. [2]

2. Petitioner contends (Pet. 6-7, 8), however, that there can be no "final judgment" terminating the civil action until the district court takes some further action subsequent to the Secretary's final decision on remand. This contention is inconsistent with Finkelstein. There, the Court held that in an action for judicial review pursuant to 42 U.S.C. 405(g), a district court order reversing the Secretary's decision denying benefits and remanding the case to the Secretary for a rehearing is a "final judgment" that is subject to immediate appeal by the Secretary under 28 U.S.C. 1291. The Court found in the structure of 42 U.S.C. 405(g) an indication that each final decision of the

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[2] In this case, for example, petitioner requested EAJA fees more than one year after the Secretary determined on remand that he was disabled. Under petitioner's view, however, his fee request would be deemed timely (indeed premature) because the district court had not entered an order "affirming" the Secretary's uncontested determination that petitioner was eligible for benefits.

Secretary (i.e, the first such decision and the decision rendered after the remand) "will be reviewable in a separate piece of litigation." 110 S. Ct. at 2663. Accordingly, the district court's remand order "terminated the civil action" challenging the Secretary's first decision denying benefits. Id. at 2664. Thus, there is nothing in the nature of a civil action for judicial review under 42 U.S.C. 405(g), or of a remand order entered at the conclusion of such an action, that requires the district court to do anything further after the remand to the Secretary.

Hudson held that "for purposes of the EAJA," the administrative proceedings following the remand may be considered "part and parcel of the [civil] action for which fees may be awarded." 109 S. Ct. at 2255. See Finkelstein, 110 S. Ct. at 2666. But nothing in this holding regarding the services for which fees may be awarded requires the district court to take any further action, following the remand, to terminate the civil action on the merits. To the contrary, the Court made clear in Finkelstein that despite its prior holding in Hudson, the civil action was terminated, insofar as any substantive role of the district court was concerned, when it remanded the case to the Secretary. 110 S. Ct. at 2666-2667. Thus, Hudson and Finkelstein together contemplate that a "civil action" under 42 U.S.C. 405(g) extends (for purposes of EAJA) to the ancillary administrative proceedings on remand, but that the civil action, as so extended, terminates (for purposes of EAJA) if the

Secretary renders a decision on remand that is fully favorable to the claimant and is, for that reason, final and not appealable by either party. Contrary to petitioner's contention (Pet. 7-11), then, the decision below is fully consistent with both Hudson and Finkelstein.

3. In arguing that some further action by the district court is required in order for there to be a "final judgment" for purposes of EAJA, petitioner relies (Pet. 5) on the language in the sixth sentence of 42 U.S.C. 405(g) stating that "the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based." The seventh sentence then provides that "[s]uch additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision." In petitioner's view, these provisions confirm that the Secretary must file his decision on remand with the district court and that the district court must then enter a judgment on the basis of that filing.

Petitioner's argument ignores the fact that, as Finkelstein held, the sixth and seventh sentences of Section 405(g) do not apply to all remands by the district court in cases under Section 405(g); they instead are concerned with a special

and limited sort of remand, for the receipt and weighing of new evidence, during which the case remains within the jurisdiction of the district court. See 110 S. Ct. at 2664-2665. Those provisions are inapplicable to all other remands in civil actions under Section 405(g). For the same reason, petitioner errs in relying (Pet. 7-8) on the passing reference in Hudson (109 S. Ct. at 2255) to tne description of the sixth sentence of Section 405(g) in Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983). This Court subsequently recognized in Finkelstein that the sixth and seventh sentences have a far narrower scope, and it declined to follow the broader implications of the language in Hudson. See 110 S. Ct. at 2666-2667.

4. Perhaps appreciating this defect in his broad reliance on the sixth sentence of Section 405(g) and Hudson in the wake of Finkelstein, petitioner asserts (Pet. 10-11) that the district court's remand order in this case was entered pursuant to the sixth sentence of Section 405(g) and that the Secretary therefore was required to file his remand decision in this case with the district court, which would then have entered a final judgment on the basis of such a filing. For this reason, petitioner maintains, the decision below is inconsistent with Finkelstein's discussion of the sixth sentence of Section 405(g). This argument is without merit. Nothing in the district court's order in this case suggests that the remand was pursuant to the sixth sentence of Section 405(g): there is no indication that the

court was retaining jurisdiction with the intention of entering its final judgment on the merits at a later date, after the Secretary filed his modified findings and decision with the court. To the contrary, the court expressly styled its order a "judgment" and stated that "the matter is remanded to the Secretary for all further proceedings." App. D, infra (emphasis added). The district court thus clearly contemplated that it was terminating all judicial proceedings on the merits of petitioner's claim for benefits and returning the matter to the jurisdiction of the Secretary, just as was done in Finkelstein. [3]

5. Petitioner also contends (Pet. 5-6) that review is warranted because the decision below conflicts with Guthrie v. Schweiker, 718 F.2d at 106; Brown v. Secretary of HHS, 747 F.2d 878, 884-885 (3d Cir. 1984); and Taylor v. Heckler, 778 F.2d 674, 677 (11th Cir. 1985). In light of intervening developments, however, those decisions do not justify review in this case.

The Fourth Circuit in Guthrie relied on three premises in holding that the Secretary should file his new decision on remand

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[3] There would be much to commend the Ninth Circuit's approach even in a case remanded to the Secretary pursuant to the sixth sentence of Section 405(g). Where the Secretary renders a fully favorable decision after such a remand, there is little point in filing the decision and transcript of proceedings with the district court or in requiring further action by the district court as a precondition to the filing of a fee application. Following the Ninth Circuit's approach in that setting also would have the virtue of uniformity, thereby eliminating the need to distinguish between different kinds of remands in construing sometimes ambiguous district court orders. This case, however, presents no occasion for addressing whether the 30-day period for filing an EAJA application might, in appropriate circumstances, commence with the rendering of a fully favorable decision on remand under the sixth sentence of Section 405(g).

with the district court and the district court should then enter a judgment on the basis of that decision, which would trigger the 30-day period for filing a fee application under EAJA. Each of those premises has since been shown to be erroneous. First, the Fourth Circuit believed, contrary to the subsequent decision in Finkelstein, that a district court's remand order is not a final decision that terminates proceedings in the court and is subject to immediate appeal. 718 F.2d at 106. Second, in concluding that the Appeals Council's decision on remand cannot be a "final judgment" that commences the 30-day period for filing an EAJA application, the Fourth Circuit relied on its view that "EAJA draws a clear distinction between final administrative actions and final judicial actions." Ibid. (comparing 5 U.S.C. 504(a)(2) with 28 U.S.C. 2412(d)(1)(B)). This rationale is inconsistent with the subsequent decision in Hudson, where the Court rejected the government's similar argument (likewise based on a comparison between 5 U.S.C. 504 and 28 U.S.C. 2412) that the administrative proceedings on remand are wholly distinct from the "civil action" for purposes of EAJA. 109 S. Ct. at 2257-2258. Third, as noted above, Guthrie relied on the language in the sixth sentence of Section 405(g) requiring the Secretary to file his new decision on remand with the district court (718 F.2d at 106); Finkelstein held, contrary to the Fourth Circuit's apparent belief, that this provision does not apply to all remands. 110 S. Ct. at 2664. [4]

[4] Moreover, as the Court observed in Finkelstein, "it is far from clear that Guthrie did not involve a sixth-sentence remand." 110 S. Ct. at 2666 n.8.

In Brown, the Third Circuit, following Guthrie and likewise relying on the sixth sentence of Section 405(g), stated in dictum that the Secretary must file his new decision on remand with the district court and the district court may then affirm, modify or reverse that decision, which would constitute the requisite "final judgment" triggering the 30-day EAJA filing period. 747 F.2d at 884-885. Like Guthrie, this analysis in Brown does not survive Finkelstein. In Taylor, the Eleventh Circuit reasoned that a district court order remanding a case to the Secretary is not a final judgment subject to immediate appeal; that because the remand order therefore is interlocutory, the district court retains jurisdiction during administrative proceedings on remand; that the district court therefore must enter an order at a later date to terminate its jurisdiction; and that an order entered after the administrative proceedings have been completed on remand therefore must be the one that terminates the court's jurisdiction and therefore is the "final judgment" that commences the 30-day period for filing an EAJA application. 778 F.2d at 677-678 & n.2. The basis for the Eleventh Circuit's belief that the district court must enter a post-remand order (which in turn must be the "final judgment" for EAJA purposes) -- namely, that a remand order is not appealable -- of course was erroneous under Finkelstein.

In short, all of the decisions upon which petitioner relies for his assertion of a circuit conflict rest on premises that have since been shown by Hudson and Finkelstein to have been

erroneous. Because the asserted circuit conflict has been superseded, it does not warrant review. There is, moreover, no conflict between the decision below and a post-Finkelstein decision of another court of appeals. The only other court to consider the question since Finkelstein has also concluded, relying on the Ninth Circuit's decision in this case, that a fully favorable decision by the Secretary after a remand is a "final judgment" that triggers the 30-day period for filing a fee application under EAJA. Gordon v. Secretary of HHS, No. 90-1206 (6th Cir. Oct. 15, 1990). [5]

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[5] In Myers v. Sullivan, No. 89-3533 (11th Cir. Nov. 6, 1990), which was a consolidated opinion rendered in four individual cases, the Secretary's decision on remand in fact was filed with the district court (either by the Secretary or the claimant), and the district court then entered an order disposing of the case. The court held that, even though the district court in each case sustained the Secretary's decision on remand (and even though the Secretary therefore would be unlikely to appeal such an order), the orders did not become "final judgments" that commenced the 30-day period for filing an EAJA application until there was some affirmative indication that the Secretary would not appeal. In the court's view, that ordinarily would be only after the 60-day period for filing a notice of appeal under Fed. R. Civ. P. 4 had expired, unless there was some earlier, definitive statement by the Secretary disavowing appeal. Slip op. 458-459.

Because the administrative decisions on remand in Myers had been filed with the district court and the district court then entered an order disposing of each case, the Eleventh Circuit had no occasion to consider whether the Secretary's fully favorable decision on remand would have qualified as a "final judgment." The Eleventh Circuit did, however, describe the practice under Guthrie, Brown and its own decision in Taylor as reflecting rules that, "[u]ntil recently," had governed Social Security cases. Slip op. 459-460. Especially in light of the view expressed elsewhere in the opinion that Finkelstein had worked a substantial change in governing principles (slip op. 465-466), the implication of the Eleventh Circuit's observation is that those rules no longer obtain. The court also stressed that the term "final judgment" is to be interpreted flexibly and pragmatically.

For similar reasons, petitioner's reliance (Pet. 6-7) on the reference to Guthrie in the House Report on the 1985 amendments to EAJA is misplaced. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 19-20 (1985). That reference was in a part of the Report that discussed a provision of the 1985 amendments addressing the interaction of EAJA and the special provision in the Social Security Act, 42 U.S.C. 406(b), for payment of attorney's fees out of the claimant's past-due benefits. As part of the background for that discussion, the Report described how some courts had resolved EAJA issues in the Social Security context. Thus, the Report noted that a claimant ordinarily had not been regarded as a "prevailing party" solely by virtue of obtaining a remand to the Secretary. Id. at 19. It then stated that Guthrie had "pointed to the provision of 42 U.S.C. 405(g) providing that after the HHS review upon remand the agency must file its findings with the reviewing court." Ibid. The Report continued: "Thus the remand decision is not a 'final judgment,' nor is the agency decision after remand"; "[i]nstead, the District Court should enter an order affirming, modifying or reversing the final HHS decision, and this will usually be the final judgment that starts the 30 days running." Ibid.

As the Court noted in Finkelstein (110 S. Ct. at 2665-2666 n. 8), this 1985 Report on EAJA sheds no light on the interpretation of Section 405(g) as originally enacted in 1939, and its discussion of the procedures required by Section 405(g) and Guthrie was mistaken. The Report therefore sheds little

light on whether, once those essential but mistaken premises are put to one side, the Secretary's decision on remand may properly be regarded as the "final judgment" for purposes of commencing the 30-day period for seeking EAJA fees -- especially in light of the subsequent decisions in Hudson, holding that the proceedings on remand are part of the civil action for purposes of EAJA, and in Finkelstein, holding that a remand order terminates the proceedings in the district court.

In light of Finkelstein, neither the Secretary nor the district court is required to take any further action following many decisions on remand if those decisions are fully favorable to the claimant. If the Secretary were nevertheless required to follow the practice suggested by the House Report in connection with EAJA awards, the entry of a "final judgment" for EAJA purposes would be contingent upon some subsequent judicial action even though no such action is required by the Act. The possibility of an EAJA fee award cannot be permitted to alter the substantive requirements of the Social Security Act in this manner, and nothing in the text or purposes of EAJA -- or in common sense --requires that anomalous result. The approach adopted by the court below avoids this problem (as well as the burden and delay resulting from increased filings and review by the district court), while at the same time furnishing a clear and workable standard for determining when the 30-day period begins to run in this setting.

6. Finally, contrary to petitioner's contention (Pet. 13-

15), the decision below does not have an unfair impact on petitioner, such that it should not be applied retroactively to prevent him from recovering fees. Petitioner had no reasonable basis for believing that a fee request filed more than a year after the Appeals Council's uncontested finding of disability would be deemed timely. Moreover, the appellate decisions cited by petitioner (Pet. 14) as having suggested a contrary rule -- the Fourth Circuit's decision in Guthrie and the Third Circuit's decision in Brown -- were not binding on the District Court for the Central District of California in this case. And those decisions were handed down before the 1985 amendments to the statutory scheme that made clear that the term "final judgment" for purposes of EAJA departs substantially from its meaning in the specific context of judicial proceedings. The Ninth Circuit's reasoning in this case was based on the text of EAJA and Section 405(g), which furnished adequate notice to petitioner that the Secretary was not required to file his decision on remand with the district court. The Ninth Circuit's decision also adhered to Hudson and anticipated the rationale of Finkelstein, in which this Court found the text of Section 405(g) controlling. In these circumstances, petitioner cannot claim unfair surprise.

In addition, even if petitioner's fee request were deemed timely, it is quite unlikely that he would be found entitled to fees. The district court addressed the merits of petitioner's fee application and held that no fees should be awarded because

the government's position was substantially justified. Pet. App. 1-5. If the court of appeals had reached the merits, it would have been obligated to affirm the district court's ruling on this point unless it found that the district court had abused its discretion. Pierce v. Underwood, 487 U.S. 552 (1988). The district court specifically found, however, that the Secretary's initial denial of disability benefits was supported by the medical evidence then in the record, and the government promptly changed its position when petitioner presented new evidence of disability in connection with his second application. Pet. App. 3. This course of proceedings does not suggest that the overall position of the government lacked substantial justification. A fortiori, the district court did not abuse its discretion in so holding. Thus, there is no reason to believe that the court of appeals' construction of EAJA's time limits had any effect on petitioner's ultimate entitlement to attorney fees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
JEFFREY A. CLAIR
Attorneys

NOVEMBER 1990

APPENDIX A

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Attorneys for Defendant

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONIAN, Plaintiff, v. MARGARET M. HECKLER, Secretary of Health and Human Services, Defendant.	NO. CV 84-4317-MRP(K) DEFENDANT'S SUPPLEMENTAL MEMORANDUM

The Appeals Council has agreed, upon review, to a voluntary remand for further administrative proceedings in this case. A Stipulation for Voluntary Remand was requested of plaintiff's attorney but he would not agree to so stipulate. Defendant hereby requests that the Court, in its discretion and pursuant to plaintiff's prayer for relief in his complaint, order this case be

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remanded pursuant to the Appeals Council decision to review for further administrative proceedings.

DATED: This 19th day of December, 1984.

Respectfully submitted,

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

Evelyn M. Matteucci
EVELYN M. MATTEUCCI
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Attorneys for Defendant

APPENDIX B

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Attorney for Plaintiff

Amended Pg. 2-27-84, 8:45 A

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONIAN, Plaintiff, vs. MARGARET M. HECKLER, Secretary of Health and Human Services, Defendant.	NO. CV 84 4317 MRP-K PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION FOR VOLUNTARY REMAND

When the plaintiff appealed to the Secretary's Appeals Council for review of Administrative Law Judge Harry C. Kessel's decision denying the plaintiff's disability, the Appeals Council advised that there was no basis under the regulations to grant review, (Tr. 2), and that if he wished to appeal, he should bring action in U.S. District Court.

Now that the plaintiff has followed the Secretary's advice and appealed to the District Court, the Secretary appears to have changed her position, in that she requests "voluntary remand for further administrative proceedings." The Secretary however does not admit error or indicate what will happen in the course of administrative

proceedings. The Secretary's vague reference presents the real possibility of returning to Judge Kessel for another installment of error ridden and grossly defective proceedings. Plaintiff does not particularly welcome such a prospect.

Counsel for plaintiff believes that the record is complete, and that plaintiff has proved his disability based on his application of May 28, 1982. Counsel knows of nothing that remains to be done, except for the Secretary to order payment of benefits. Counsel sees no advantage in regressing to a lower level of review; our judicial system is structured for appeal to a higher level of review for a dissatisfied claimant such as the plaintiff. Since the Secretary is not yet inclined to order payment of benefits to the plaintiff, he has no choice but to appeal to the Court to order payment of benefits.

The plaintiff therefore prays that the Court will reject the Secretary's request and grant the plaintiff's motion for summary judgement.

Dated: December 27, 1984

Respectfully submitted,

John Ohanian Inc.

By: _____
John Ohanian
Attorney for Plaintiff

APPENDIX C

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONIAN, Plaintiff, vs. MARGARET M. HECKLER, Secretary of Health and Human Services, Defendant.	NO. CV 84 4317 MRP(K) EX PARTE APPLICATION TO REMAND: AND ORDER

On December 18, 1984, defendant filed a supplemental memorandum advising that the Appeals Council had agreed to a voluntary remand for further administrative proceedings in this case.

On December 27, 1984, plaintiff filed an objection to the defendant's motion for voluntary remand, with the expectation that the Magistrate would promptly issue his report and recommendation.

Plaintiff advises that his breathing problem has worsened and that his wife is seriously ill, so that he is confronted with considerable medical expenses and is anxious to have this matter concluded. In the event a favorable decision issued in this case, plaintiff would receive funds that could be used for medical expenses.

In view of the mentioned circumstances, counsel for plaintiff files this ex parte application for an order remanding this case to the defendant, with the belief that this will expedite resolution of the plaintiff's claim. Since plaintiff does not know when the Magistrate may issue his report and recommendation in this case, plaintiff asks the Magistrate to use his discretion and either issue his report and recommendation, or remand the cause to the Secretary.

Dated: March 28, 1985

Respectfully submitted,

John Ohanian Inc.

By: [signature]
John Ohanian
Attorney for Plaintiff

ENTERED
APR 05 1985
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONIAN, Plaintiff, v. MARGARET M. HECKLER, SECRETARY OF HEALTH and HUMAN SERVICES, Defendant.	)	NO. CV 84-4317-MRP(K) JUDGMENT

Defendant's motion to remand, concurred in by plaintiff, is granted. The matter is remanded to the Secretary for all further proceedings.

DATED: This 3 day of April, 1985.

[signature]
MARIANA R. PFAELZER
United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ZAKHAR MELKONYAN, PETITIONER	)	
v.	)	No. 90-5538
LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE RESPONDENT IN OPPOSITION** by mail on November 23, 1990.

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Kenneth W. Starr
KENNETH W. STARR
Solicitor General

November 23, 1990

ORIGINAL

No. 90-5538

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ZAKHAR MELKONYAN - PETITIONER

vs.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH
AND HUMAN SERVICES - RESPONDENT

REPLY BRIEF FOR PETITIONER

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Counsel of Record

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-5538

ZAKHAR MELKONYAN - PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent's brief confuses the issues in this case and incorrectly concludes that there is no conflict between the Third, Fourth, and Eleventh Circuits' decisions in Guthrie v. Schweiker, 718 F.2d 104 (4th Cir. 1983, Brown v. Secretary of HHS, 747 F.2d 878 (3rd Cir. 1984), and Taylor v. Heckler, 778 F.2d 674 (11th Cir. 1985), respectively as compared to the Ninth Circuit's decision in Melkonyan v. Sullivan, 895 F.2d 556 (9th Cir. 1990), so respondent recommends that the Court deny petitioner's request for a writ of certiorari.

I. The split in circuits remains as to whether an administrative decision after a court remand is the "final judgment in the action" under the EAJA.

Respondent's brief contains numerous arguments in support of his position. Initially, respondent contends that "there is no post-Finkelstein circuit conflict on the question whether the Secretary's final and non-appealable decision on remand may be regarded as a "final judgment" for purposes of EAJA." Respondent misinterprets Finkelstein as overruling Guthrie, Brown, and Taylor.

Respondent's conclusion is based in part on his misstatement of the language of the Equal Access To Justice Act (EAJA), which is in issue here. The question is not whether an administrative decision after court remand can be a "final judgment," but whether it can be a "final judgment in the action." EAJA, 28 U.S.C. Section 2412(d)(1)(B) [emphasis added]. The 1985 amendments of the EAJA clarified the words "final judgment" to mean a judgment which is no longer appealable, and did not disturb the remaining phrase "in the action." Pub.L.No. 99-80, 99 Stat. 185, codified at 28 U.S.C. Section 2412(d)(2)(G).

There is nothing in Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990), to indicate that this Court intended to overrule Guthrie, Brown, or Taylor, and furthermore, Finkelstein cites Guthrie and the procedure required by 42 U.S.C. 405(g) with approval.1/ Respondent's argument overlooks the fact that Hudson approved the very cases which the court below refused to follow. (See pp. 7-9, of petition for writ of certiorari). Thus, respondent's arguments

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1/ See Finkelstein v. Sullivan, id., n. 8, at p. 2665.

are based upon erroneous interpretations of Finkelstein, and Hudson.

A. Finkelstein was not an EAJA case, and took pains to preserve the longstanding prior law on timeliness of attorney fee applications under the EAJA.

Respondent interprets Finkelstein, to overrule the prior EAJA case law in three circuits (Guthrie, Fourth; Brown, Third; and Taylor, Eleventh), on the question of timeliness of EAJA applications. However, Finkelstein carefully distinguished its holding that certain "judgment[s] under 42 U.S.C. Section 405(g) are appealable "final decisions" under 28 U.S.C. Section 1291, from any conclusions about timing of attorney fee applications under the EAJA. Sullivan v. Finkelstein, id. at pp. 2665-67 & n. 8. The decision in Finkelstein is distinguishable from the decisions in Hudson, Guthrie, and the legislative history of the 1985 amendments to the EAJA, since Finkelstein was concerned with appealability, and not the running of the 30-day EAJA clock. Finkelstein therefore should not be read to affect attorney fee contexts without careful consideration by this Court. To do so, would create serious conflicts with existing law. For example, under 42 U.S.C. Section 406(b), a judgment of the court favorable to the claimant is needed as a predicate for an award of regular attorney's fees under the Social Security Act.

B. Respondent does not recognize any conflict between Myers v. Sullivan and Melkonyan.

Respondent also contends there is no conflict between Myers v. Sullivan, 916 F.2d 659 (11th Cir. 1990), and Melkonyan. This

is contraindicated by the Myers court's statement that Melkonyan, "would seem to be contrary to Sullivan v. Hudson." (See pp. 679-680, & n. 20). Moreover, the thrust of the decision clearly indicates that if the Myers court were to have decided the issue in Melkonyan, that it would have disagreed with the Ninth Circuit's decision. The Myers court was faced with the question of whether the 30-day clock begins to run when the district court enters its final judgment, or when the 60-day time for appeal by the Secretary from the district court's judgment expires.

The Myers court held that in the case of contested remand orders, the 30-day clock does not begin to run until expiration of the 60-day period. However, where the remand order is not contested by the Secretary, who agreed to pay the full amount of the disability benefits requested on remand, the 30-day clock begins to run when the district court enters its final order dismissing the case. Thus, the decision in Myers indicates that the Eleventh Circuit still follows Taylor v. Heckler, id., and until a court has entered final judgment, the 30-day clock will not commence to run. Consequently, it is clear that if the Myers court had been presented with the issues in Melkonyan, it would have decided that since the district court had not yet entered a final judgment, that the 30-day ock had not begun to run.

In addition, it is only a matter of time before other circuits issue decisions that will directly conflict with Melkonyan. In this regard, a number of district courts have recently issued decisions that disagree with Melkonyan. See Bradley v. Secretary,

of HHS, 741 F.Supp. 1461 (D.Idaho 1990); and Gutierrez v. Sullivan, 734 F.Supp. 969 (D. Utah 1990).

C. Respondent argues that the Appeals Council's decision is a final judgment in the action.

Secondly, respondent points out that "judgment" is used as a term of art having special application to judicial proceedings and typically refers to an order of a court that is appealable. Respondent argues that since the EAJA definition of this term requires the order to be "final and not appealable," this departure reinforces the conclusion that Section 2412(b)(1)(B) should not be read to limit the "final judgment[s]" that trigger the 30-day filing period to orders that have been entered by the courts.

While respondent's argument may be technically correct with respect to the definition of "judgment," it ignores the fact that when Congress passed the August 5, 1985, amendments to the EAJA, it did not intend a major overhaul of the Act, but merely wanted to indicate its preference for the Seventh Circuit's decision in McDonald v. Schweiker, 726 F.2d 311 (7th Cir. 1983), over the Ninth Circuit's decision in McQuiston v. Marsh, 707 F.2d 1082 (9th Cir. 1983). It was also significant that Congress cited Guthrie with approval. Legislative history2/ also reveals Congress stated that neither the judicial remand to the agency nor the agency decision after remand constitutes final judgment.

2/ See p. 6, of petition for writ of certiorari, and Myers v. Sullivan, at pp. 667-672.

Respondent contends Finkelstein held that sixth and seventh sentence remands under 42 U.S.C. Section 405(g), are concerned with special and limited sorts of remand, and petitioner errs in relying on the passing reference in Hudson (109 S.Ct. at p. 2255) to the description of the sixth sentence of Section 405(g) in Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983). Respondent then concludes that nothing in the district court's remand order in Melkonyan suggests that the remand was pursuant to the sixth sentence of Section 405(g). The district court styled its order a "judgment" and stated that "the matter is remanded to the Secretary for all further proceedings," as was the case in Finkelstein. Respondent concludes that the district court thus "clearly contemplated that it was terminating all judicial proceedings on the merits of petitioner's claim for benefits and returning the matter to the jurisdiction of the Secretary, just as was done in Finkelstein."

Respondent is mistaken in characterizing the remand in this case as a "sentence-four" remand, since it clearly was a "sentence-six" remand. The remanding court never reached the merits of the case, but remanded to consider new evidence. It is the purpose of the remand and not the language of the remanding court's order, which makes a difference under Finkelstein, id. at pp. 2663-2664. In addition, respondent's technical analysis ignores the fact that the thrust of the decisions in both Finkelstein and Myers fully require that the Secretary comply with 42 U.S.C. Section 405(g), before the 30-day clock begins to run.

II. The decision below also conflicts with decisions of this Court and other circuits re: tolling and non-retroactivity where an applicant reasonably relied upon the government's statements and prior circuit law.

Finally respondent concludes that all of the decisions upon which petitioner relies for his assertion of a circuit conflict rest on premises that have since been shown by Hudson and Finkelstein to have been erroneous, and because the asserted circuit conflict has been superceded, it does not warrant review.

Respondent also contends that the "[p]etitioner had no reasonable basis for believing that a fee request filed more than a year after the Appeals Council's uncontested finding of disability would be deemed timely." (Res. p. 21). Petitioner has attached hereto an Appendix, which provides a chronological listing of events which demonstrates that Melkonyan, and others similarly situated, were caught in a trap for the unwary by the misleading statements of the Secretary.

Even conceding that respondent is correct in his contentions as discussed above, equitable principles require that Hudson and Finkelstein should not be applied retroactively. In Myers v. Sullivan, id., at pp. 677-678, the court held that Finkelstein should not be applied retroactively relying on this Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 296 (1971), for the rule that a judicial decision should not be applied retroactively, where 1) it establishes a new principle of law or decides an issue of first impression whose resolution was not clearly foreshadowed, 2) the court determines

that retrospective operation will retard operation of the law, and 3) where the court's decision could produce substantial inequitable results if applied retroactively.

Recently, in Irwin v. Veterans Administration, No. 89-5867 (Dec. 3, 1990), this Court held that a limitations period similar to the 30-day EAJA filing period, may be equitably tolled if the plaintiff relied on conduct by the United States which was misleading. The Secretary has consistently told this Court and circuit courts that he would return to court with any decision he reached after court remand. The Secretary assured this Court in both Hudson and Finkelstein, that he would bring his decisions after remands back to court, so that the court could comply with 42 U.S.C. Section 405(g). (See p. 12, of petition for writ of certiorari). These statements by the Secretary trapped litigants like Melkonyan who felt safe in waiting for the Secretary to bring his remand decision back to court as required by Section 405(g), and as promised by the Secretary. Under Irwin v. Veterans Administration, id., such conduct tolls the 30-day clock.

In this connection, it should be noted that another panel of the Ninth Circuit in Beckstead v. Sullivan, No. 89-15715 (9th Cir. Dec. 5, 1990), (not published), 1990 U.S. App. LEXIS 21246, has recently held that Melkonyan should not be applied retroactively. It is also relevant to note that if the district court below intended to do what respondent now contends, the district court would have promptly dismissed petitioner's application for EAJA attorney's fees on the ground that it was not timely filed,

instead of ruling on February 18, 1987, that the government's position was substantially justified. It should be clear that the district court still believed, as did the petitioner, that Guthrie and 42 U.S.C. Section 405(g) required compliance by the court entering a final judgment.

It is quite apparent that the Eleventh Circuit's decision in Myers v. Sullivan, id., does not concur in the Ninth Circuit's decision in Melkonyan, and indicates that Guthrie, Brown, Taylor, and 42 U.S.C. 405(g) are still the law of the land. It is quite apparent that in time other circuits, particularly the Third and the Fourth will undoubtedly disagree with Melkonyan. Moreover, while the Secretary has informed the courts that he complies with Guthrie, and 42 U.S.C. Section 405(g), (See Appendix pp. 1, 4, and 5), the record reflects that he has not complied with Section 405(g) for some time, and now states that such compliance is not necessary.

Respondent argues that "the appellate decisions cited by petitioner (Pet. 14) as having suggested a contrary rule -- the Fourth Circuit's decision in Guthrie and the Third Circuit's decision in Brown -- were not binding on the District Court for the Central District of California in this case. And those decisions were handed down before the 1985 amendments to the statutory scheme that made clear that the term 'final judgment' for purposes of EAJA departs substantially from its meaning in the specific contexts of judicial proceedings." (See respondent's brief p. 21). The logic of this argument which contends that petitioner

should not have relied upon case law from other circuits which predated the 1985 EAJA amendments, is flawed since there is nothing in the Act to suggest that the amendments overturned past precedent, except for McQuiston v. Marsh, id. However, all circuits selectively follow case law from other circuits, including the Ninth.

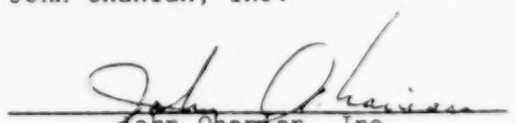
III. Conclusion

Respondent's arguments do not accurately describe the applicable law, and ignore the uncertainty, confusion and conflicts which have existed in the courts and among the practicing bar since passage of the August 5, 1985, amendments to the EAJA, as well as the Secretary's failure to in fact comply with his assurances to the courts that he complied with Guthrie and 42 U.S.C. Section 405(g). It is clear that the Secretary has misled the courts and the practicing bar in this respect.

Petitioner respectfully requests that a writ of certiorari issue.

Respectfully submitted,

John Ohanian, Inc.



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APPENDIX

Summarized below are certain events listed in chronological order which demonstrate that the petitioner and others similarly situated were caught in a trap for the unwary.

1. On September 19, 1983, the court in Guthrie v. Schweiker, id., held that the Secretary had to comply with 42 U.S.C. Section 405(g) and file any "additional and modified findings of fact and decision, and a transcript of the additional record and testimony ...", so that the district court could then enter its final judgment, which would commence running of the 30-day period.

2. On November 23, 1984, the Third Circuit in Brown v. Secretary of HHS, id., wrote "[t]he Secretary ... indicates that should a claimant receive benefits upon remand, the case must still return to the district court for a final judgment." When the court issued its decision in Brown, there was no dispute among the circuits that the 30-day clock began to run after the district court issued its final judgment.

3. On May 7, 1985, the Appeals Council issued its favorable decision granting the petitioner the disability benefits that he had applied for on May 28, 1982. Based on the available legal precedent, the courts and the practicing bar were in agreement that the 30-day EAJA clock did not begin to run until after 1) the Secretary filed his compliance with the district court, and 2) the court entered its final judgment, as the Secretary had assured the court in Brown v. Secretary of HHS, id. There was no question that both Guthrie and 42 U.S.C. Section 405(g) required

the Secretary to file his compliance with the court's remand order, and that the district court would then enter its judgment, thus triggering the running of the 30-day EAJA clock.

4. On August 5, 1985, Congress amended the EAJA by defining "final judgment" as a "judgment that is final and not appealable, and includes an order of settlement..." The legislative history reveals that Congress intended this added language to show its concurrence with the Seventh Circuit's views as expressed in McDonald v. Schweiker, id., and as opposed to the Ninth Circuit's decision in McQuiston v. Marsh, id., with respect to interpretation of the term "final judgment." The House Report emphasized that "this section should not be used as a trap for the unwary resulting in the unwarranted denial of fees," and warned courts to "avoid an overly technical construction" of the timeliness requirement.1/

5. On December 16, 1985, the Eleventh Circuit in Taylor v. Heckler, 778 F.2d 674 (11th Cir. 1985), agreed with the decisions in Guthrie, and Brown, that the Secretary must comply with 42 U.S.C. Section 405(g), so that the district court could enter its final judgment and the 30-day clock would begin to run.

6. Petitioner filed his application for EAJA attorney's fees

1/ See H.R.Rep.No. 120, 99th Cong., 1st Sess. 18 n. 26, reprinted in 1985 U.S.Code Cong. & Admin. News 132, 146 n. 26. Also see Myers v. Sullivan, id., at 667 and 668, for "Pre-1985 Authority," and "The 1985 Amendments and Implementing Case Law."

on May 19, 1986, in U.S. District Court, and based upon the then existing law and respondent's public statement in Brown that he would comply with 42 U.S.C. Section 405(g), there was no question in counsel's mind that the 30-day clock did not begin to run until the Secretary had filed his motion with the district court, and the court had then entered its judgment or order.

7. On December 1, 1986, the court in Warner v. Bowen, 648 F.Supp. 1409 (S.D.Fla. 1986), considered the Secretary's arguments as to when "final judgment" occurred in the case: 1) when the order of remand issued, and alternatively 2) when the favorable administrative decision issued after remand, and declared that "the Secretary's current posture that non-action and non-notification to the Court constitutes final judgment is somewhat incredulous." The court held that 42 U.S.C. Section 405(g) required the Secretary to inform the court of its decision so that it could issue a final judgment which would commence the running of the 30-day period.

8. On January 13, 1987, the court in La Manna v. Secretary of HHS, 651 F.Supp. 373, 376 (N.D.N.Y. 1987), stated that its "examination of the applicable case law here reveals an area of uncertainty and possible confusion to the bar in matters relating to application for attorney's fees under the Equal Access To Justice Act. The uncertainty revolves around whether the thirty-day period during which the fees application must be filed commences upon the date of entry of the district court's order, as held in Tripodi, Taylor, and Guthrie, or whether the district court must

take into account the possibility of an appeal of its order, and if so, the effect of an appeal on the commencement of the running of the thirty-day period."

9. On February 18, 1987, the district court below denied petitioner's application for EAJA attorney's fees for the sole reason that respondent's position had been substantially justified. The court must have considered running of the 30-day clock, but apparently concluded that since respondent had not yet complied with 42 U.S.C. Section 405(g), the 30 day time limit was not in issue. The court said nothing to indicate that petitioner's application was not filed timely.

10. On July 30, 1987, a Deputy Clerk of the Ninth Circuit issued an order in Melkonyan which said, "[a]ppellant apparently failed to satisfy the requirements of 28 U.S.C. Section 2412(d), when he filed an application for attorney's fees over one year after judgment was rendered in the district court. Therefore, it is unclear whether the district court had jurisdiction to entertain appellant's motion for fees." This was the first indication by the courts below that the petitioner's motion for EAJA fees might not have been filed timely.

11. The Secretary informed this Court by his brief in Sullivan v. Hudson, id., (decision issued June 12, 1989), that he would comply with the procedure required by Guthrie, and 42 U.S.C. Section 405(g).

12. On June 30, 1989, the Ninth Circuit instructed the district court to dismiss petitioner's EAJA petition on the ground

that it had not been filed timely.

13. After petitioner filed a petition for a rehearing with the Ninth Circuit, the court on January 31, 1990, once again instructed the district court to dismiss petitioner's EAJA petition on the ground that it had not been filed timely.

14. The Secretary once again informed this Court by his brief in Sullivan v. Finkelstein, id., (decision issued on June 18, 1990), that he complied with the procedure required by Guthrie, and 42 U.S.C. Section 405(g).

15. On November 6, 1990, the Eleventh Circuit issued a decision in Myers v. Sullivan, id., which indicates that the Circuit still follows Guthrie, Brown, and Taylor, and complies with 42 U.S.C. Section 405(g). It is quite apparent that if the Myers court had been presented with the issue in Melkonyan, that it would have disagreed with the Ninth Circuit's decision in Melkonyan.

16. On December 5, 1990, the Ninth Circuit in Beckstead v. Sullivan, No. 89-15715, (unpublished), 1990 U.S. App. LEXIS 21246, held that Melkonyan should not be applied retroactively.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ZAKHAR MELKONYAN, PETITIONER	)	
v.	)	No. 90-5538
LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,	)	

CERTIFICATE OF SERVICE

I, John Ohanian, hereby certify that all parties required to be served have been served copies of the REPLY BRIEF FOR PETITIONER, by mail on December 24, 1990, pursuant to Supreme Court Rules 29.3 and 29.4, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid.

The name and address of the party served is as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

John Ohanian Affiant

December 24, 1990

ORIGINAL

No. 90-5538

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ZAKHAR MELKONYAN, PETITIONER

v.

LOUIS W. SULLIVAN
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-5538

ZAKHAR MELKONYAN, PETITIONER

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LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Pursuant to Rule 15.7, the Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully files this supplemental brief to call the Court's attention to a new appellate decision that was not available at the time we filed the brief in opposition.

The Ninth Circuit held in this case that -- following the district court's remand of a Social Security case to the Secretary for further proceedings -- a final, non-appealable administrative decision in favor of the claimant commences the 30-day period in which an attorney fee application must be filed under the Equal Access to Justice Act (EAJA), 28 U.S.C.

2412(d)(1)(B). As we pointed out in the brief in opposition (at 18), in the only other court of appeals case to have addressed the question since this Court's decisions in Sullivan v. Hudson, 109 S. Ct. 2248 (1989), and Sullivan v. Finkelstein, 110 S. Ct. 2658 (1990), the Sixth Circuit, relying on the Ninth Circuit's decision in this case, similarly held that a fully favorable decision by the Secretary after a remand commences the 30-day filing period. Gordon v. Secretary of HHS, No. 90-1206 (Oct. 15, 1990). Now, the Seventh Circuit, likewise relying on the Ninth Circuit's decision in the instant case, has also held that a final, non-appealable decision in favor of the claimant on remand commences the 30-day period for filing an EAJA application. See Jabaay v. Sullivan, No. 90-1104 (Dec, 14, 1990), reproduced as an appendix to this brief. In view of these recent and consistent developments, review by this Court is not warranted.

For the foregoing reasons and those stated in the brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

DECEMBER 1990

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-1104

ALICE JABAAY,

Plaintiff-Appellant,

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois.
No. 85-C-8801—James B. Parsons, *Judge.*

ARGUED JULY 11, 1990—DECIDED DECEMBER 14, 1990

Before WOOD, JR., MANION and KANNE, *Circuit Judges.*

PER CURIAM. Plaintiff-appellant, Alice Jabaay, appeals the denial of her application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. EAJA permits an award of attorney's fees incurred by the "prevailing party . . . in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified . . . ." 28 U.S.C. § 2412(d)(1)(A). The district court found that Jabaay was not a "prevailing party" and that the government's position was "substantially justified." Jabaay challenges these findings. Although we are inclined to agree

with the district court, we are constrained to remand this case for dismissal because the district court lacked jurisdiction to consider Ms. Jabaay's fee petition.

BACKGROUND

This litigation arose out of Alice Jabaay's claim for disabled widows benefits and supplemental security income under the Social Security Act, 42 U.S.C. §§ 402(d), 423(d). Jabaay filed for benefits on August 8, 1988, alleging that she became disabled as of March 1983 due to a bad back. On January 8, 1985, an Administrative Law Judge (ALJ) found that Jabaay was not eligible for widows benefits because her impairments did not meet any of the requirements for an award of benefits. Jabaay sought review by the Appeals Council, which was denied on May 17, 1985. She then initiated a review proceeding pursuant to 42 U.S.C. § 405(g) in the United States District Court for the Northern District of Illinois. On August 27, 1985, defendant filed an answer in the district court to Jabaay's complaint. On August 28, 1985, new mental impairment regulations governing social security benefit claims were published in the Federal Register, 50 Fed. Reg. 35038 (Aug. 28, 1985). Section 5 of the Social Security Disability Benefits Reform Act of 1984 (Reform Act), Pub. L. No. 98-460, 98 Stat. 1794, required the Secretary to reevaluate all claims that were denied between the effective date of the Reform Act, October 9, 1984 and the date the new mental impairment regulations were published in the Federal Register, to determine whether the claimant suffered any mental impairment. On December 20, 1985, Jabaay filed a motion for summary judgment in the district court. Rather than opposing the motion for summary judgment, defendant filed a motion to remand for reconsideration of plaintiff's mental impairments pursuant to the Reform Act. The district court granted this motion on February 11, 1986.

On remand, Jabaay succeeded, under the new mental impairment regulations, *see* 20 C.F.R. Pt. 404, Subpt. P. App. 1 § 12.04 (affective disorders), in obtaining all of the benefits she originally sought. On February 19, 1988, the

Appeals Council modified and adopted the ALJ's recommendation. The Appeals Council's decision, dated February 19, 1988, is the final decision on Ms. Jabaay's benefits petition. The case did not return to the district court.

On April 29, 1988, 69 days after the Appeals Council's decision, Jabaay filed a petition in the district court seeking attorney fees and expenses under EAJA. The government opposed the fee petition, arguing that Jabaay was not a "prevailing party" under EAJA because her case was remanded due to a change in the law. The government also contended that its litigation position was substantially justified. The district court granted an award of fees in an order entered on July 14, 1989; however, on July 28, 1989 the government filed a motion to alter and amend the judgment, which the court granted on November 22, 1989, thus withdrawing the award. Jabaay filed a timely notice of appeal from the judgment denying attorney fees.

ANALYSIS

The government contends that the district court did not have jurisdiction over Jabaay's fee petition because she did not file it within 30 days of "final judgment" in the social security case, as required by EAJA. 28 U.S.C. §§ 2412(d)(1)(A), (d)(2)(G). "Final judgment means a judgment that is final and not appealable and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G). The government, citing *Melkonyan v. Heckler*, 895 F.2d 556 (9th Cir. 1990), construes final judgment for purposes of EAJA to have been entered February 19, 1990, the date that the Appeals Council issued its decision granting Jabaay all the benefits she sought in the case. Jabaay counters that there is no "final judgment" in this case because the district court never entered a judgment under Federal Rule of Civil Procedure 54 in the social security action, as required by 42 U.S.C. § 405(g), and that, in any event, she filed her fee petition within 30 days of the date the Appeals Council decision became no longer revisable—and hence final and unappealable—which was on April 25,

1989, 65 days after it was issued. *See* 20 C.F.R. § 404.981 (regulating revision of Appeals Council decisions). Because the proper and timely filing of fee petitions is jurisdictional, *Melkonyan*, 895 F.2d at 557 (citing cases), we must decide when the thirty day filing period begins in EAJA cases in which a district court has remanded an underlying social security benefits case under 42 U.S.C. section 405(g).

We are confronted with two divergent lines of authority in making our decision. The majority line of cases holds that the thirty day filing period under EAJA does not commence until after the Secretary files with the district court any additional findings of the Agency on remand and after the district court thereupon enters a final judgment under Fed.R.Civ.P. 54. *See Broum v. Secretary of Health & Human Services*, 747 F.2d 875 (3d Cir. 1984); *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983); *Seymore v. Secretary of HHS*, 1990 U.S. Dist. LEXIS 6490 (N.D. Ohio 1/31/90); *Gutierrez v. Sullivan*, 734 F. Supp. 969 (D. Utah 1990); *Thompson v. Sullivan*, 715 F. Supp. 1019 (D. Kan. 1989). The other line of cases, which is of more recent origin and which is exemplified by *Melkonyan v. Heckler*, 895 F.2d 556 (9th Cir. 1990), holds that if a social security claimant succeeds on remand in obtaining all of the benefits which she sought in the initial petition, then the final judgment, for purposes of EAJA, occurs on the day that the Appeals Council enters its decision awarding the petitioner all that she sought. The rationale of these cases is that when a social security claimant receives all of the benefits she seeks, there is nothing left in the case to appeal and hence, the judgment becomes "final" as that term is defined in 42 U.S.C. § 2412(d)(2)(G). We find that the latter approach is required both by the statutory language of EAJA and by concerns for practicality and certainty in EAJA cases.

The Social Security Act allows a claimant, "after any final decision of the Secretary [to] obtain a review of such decision by a civil action . . . ." 42 U.S.C. § 405(g). As noted, under EAJA, a court may award reasonable attor-

ney fees and expenses to the prevailing party in a civil action brought by or against any agency or any official of the United States. The sixth sentence of Section 405(g) further provides that the district court may, as was done here, remand the case for further proceedings on motion of the Secretary. However, Section 405(g) specifies that:

> the Secretary shall, after the case is remanded, modify or affirm his findings of fact or decision, or both, *and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming is based. Such additional findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions*

(emphasis added). This provision, in conjunction with EAJA, creates the jurisdictional morass presented by this case.

Under EAJA, a claimant must file an application for fees "within 80 days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). A district court order remanding a case back to the agency is not, however, a final judgment. *See Sullivan v. Hudson*, ___ U.S. ___, 109 S.Ct. 2248, 2255 (1989). Nor does EAJA specify that in a social security case reviewed by the district court, the court must enter a "final judgment" under 42 U.S.C. § 405(g) for EAJA proceedings to be initiated. Nor does that section impose any time limit forcing the Secretary to make the required filings which would then enable the district court to enter a Rule 54 judgment. Thus, there is no statutory mechanism under the Social Security Act which forces the entry of a Rule 54 final judgment in a social security action in which the claimant has succeeded in obtaining all the benefits she sought after a Section 405(g) remand.

Under the majority approach, an EAJA petition may not be filed in such cases. The practical effect appears to have been that the only mechanism that forces the Secretary to file the required records under Section 405(g) is a district court decision dismissing an EAJA petition for lack of jurisdiction and ordering the Secretary to make the required filing. In our view, the majority approach leads to unnecessary delays in litigation. Under it, the 80 day EAJA filing period could conceivably not begin to run until months or even years after the Appeals Council's final decision. *See Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983) (EAJA petition filed three months after appeals council decision); *Gutierrez v. Sullivan*, 784 F. Supp. 969 (D. Utah 1990) (six months); *Thompson v. Sullivan*, 715 F. Supp. 1019 (D.Kan. 1989) (22 months). To us, this seems not only illogical and impractical, but also it cannot possibly be what congress intended in these cases.

The weakness of the majority approach is in its confusion of the fact that an EAJA application is a separate and distinct action from an action under the Social Security Act. Thus, the majority courts mistakenly reason that a Rule 54 judgment must be entered in a social security action prior to the filing of an EAJA petition. This ignores the statutory language of EAJA, which defines "final judgment" differently from the Federal Rules of Civil Procedure. A final judgment for purposes of filing an EAJA petition is "a judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G). Under Rule 54, on the other hand, final judgment "denotes a judgment that disposes of the plaintiff's claims in the district court." *McDonald v. Schweiker*, 726 F.2d 311, 313 (7th Cir. 1983). EAJA does not require the district court to enter a Rule 54 judgment. Nor does it define "final judgment" as "a Rule 54 final judgment." Rather, it requires merely that there be (1) a judgment that is (2) final and (3) not appealable. We have recognized previously that the term "final judgment" appears 151 times in the United States Code and "does not have a single fixed meaning." *McDonald*, 726 F.2d at 313. As in *McDonald*, "we have only . . . purpose inferable from context, to guide us." *Id.*

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Congress could not have intended for there to be no ascertainable starting point for the 30-day EAJA filing period to begin. Yet, this is precisely the result which the majority approach requires, for there is nothing in the Social Security Act that informs the Secretary by what date he must file the Agency's findings on remand. Under the Ninth Circuit's approach in *Melkonyan*, however, the EAJA filing period begins immediately after the first decision in the case which is "final and not appealable." This is an interpretation of EAJA which will render a definite and certain filing date for EAJA petitions. Under this approach, the EAJA filing period would in some cases begin after the Appeals Council's initial decision after remand--if the claimant receives all of the benefits she sought--and in other cases, could begin after the Appeals Council revises its initial decision and thereby awards the claimant all benefits that he sought. Still, in other cases, the EAJA clock would not begin to run until after a final judgment in the federal courts--if the social security case ends up back in the federal courts again. This is the only approach to which we believe litigants can reliably adhere. This approach is also implied by our decision in *McDonald*, 726 F.2d at 814, in which we advocated a definition of "final judgment" in EAJA cases which would result in the claimant having to file only one EAJA petition after the claimant has prevailed and the social security claims are completely resolved.

We hold, therefore, that an EAJA claimant must file for attorney's fees within thirty days after the "final judgment," as that term is defined in 28 U.S.C. § 2412(d)(2)(G), after a remand of the social security case. Here, Ms. Jabaay received all of the benefits she sought by the Appeals Council's decision rendered on February 19, 1988. Because this decision was final and unappealable it was the "final judgment" in the case. Therefore, Ms. Jabaay had 30 days from February 19th to file her EAJA petition--until March 20, 1988. Ms. Jabaay filed her petition on April 29, 1988, which was 40 days late. The district court was thus without jurisdiction to entertain the petition.

In making this decision, we are aware that the subsequent legislative history of EAJA appears to endorse the majority approach. *See* H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1 at 19-20, *reprinted in* 2 1985 U.S. Code Cong. & Admin. News 132, 148 ("the agency decision after remand is [not a final judgement]"). As Ms. Jabaay points out, the House Report cites favorably to the Fourth Circuit's decision in *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983), a case factually similar to Jabaay's, which held that there is no "final judgment" in a social security action in which the district court's jurisdiction has been invoked under 42 U.S.C. § 405(g) until the district court enters a final judgment. The *Guthrie* court stressed that the judicial review procedure in 42 U.S.C. § 405(g) "contemplates additional action both by the Secretary and a district court before a civil action is concluded following a remand." *Guthrie*, 718 F.2d at 106. Although it is also true that the Supreme Court quoted *Guthrie* with apparent approval in *Sullivan v. Hudson*, *supra*, 109 S.Ct. at 2255 (quoting *Guthrie*, 718 F.2d at 106), the Supreme Court's most recent pronouncement in this arena casts considerable doubt on the authoritative weight to be accorded this particular piece of "legislative history." *See Sullivan v. Finkelstein*, ___ U.S. ___, 110 S.Ct. 2658, 2665 n. 8 (1990); *Id.* at 2667 (Scalia, J., concurring). We find the Supreme Court's doubts persuasive and find the legislative history on the EAJA statute to be unhelpful in clarifying this very complex issue.

In conclusion, we regrettably must find that Ms. Jabaay filed her EAJA petition 40 days too late. The district court was without jurisdiction to consider the petition. Therefore, we REMAND this case for dismissal by the district court for lack of jurisdiction.

REMANDED WITH INSTRUCTIONS.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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No. 90-5538

In The

Supreme Court of the United States

October Term, 1990

ZAKHAR MELKONYAN,

Petitioner,

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Counsel for Respondent

Petition For Certiorari Filed On August 23, 1990
Certiorari Granted January 7, 1991

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September 17, 1984	Answer Filed
October 18, 1984	Plaintiff's Motion for Summary Judgment and Memorandum in Support
November 20, 1984	Defendant's Cross Motion for Summary Judgment and Memorandum in Support and in Opposition to Plaintiff's Motion for Summary Judgment
December 4, 1984	Plaintiff's Reply Brief on Summary Judgment
December 18, 1984	Defendant's Supplemental Memorandum Requesting Remand
December 27, 1984	Plaintiff's Objection to Defendant's Motion for Voluntary Remand
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May 18, 1986	Motion For Award of Attorney's Fees Under the Equal Access to Justice Act, and Memorandum in Support
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II. United States Court of Appeals for the Ninth Circuit No. 87-5716

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONYAN, Plaintiff, vs. MARGARET M. HECKLER, Secretary of Health and Human Services, Defendant.	CIVIL ACTION NO. 84-4317 COMPLAINT FOR SUPPLEMENTAL SECURITY INCOME

The plaintiff alleges as follows:

I

This is an action to review a final decision of the Secretary of Health and Human Services. This Court has jurisdiction of the action under 42 U.S.C. § 405(g), as amended.

II

The plaintiff, whose Social Security number is 562-61-9367, is a resident of the City of Los Angeles, State of California.

III

On May 28, 1982, plaintiff filed an application for supplemental security income with allegation of disability. The application was denied administratively initially and upon reconsideration, so that the plaintiff requested a hearing.

IV

A hearing was held on October 11, 1983, and the administrative law judge issued his decision on January 30, 1984, finding that the plaintiff was not disabled within the meaning of the Social Security Act.

V

The decision of the administrative law judge became the final decision of the Secretary, when it was affirmed by the Appeals Council on April 9, 1984; thus, plaintiff has exhausted all administrative remedies.

VI

The determinations of the administrative law judge and the Appeals Council are not supported by substantial evidence, are contrary to law, and constitute an abuse of discretion.

VII

The evidence of record, when fairly and accurately considered in its entirety, establishes that the plaintiff has been and is disabled within the meaning of the Social Security Act.

VIII

WHEREFORE, the plaintiff prays:

1. That the decision of the defendant be reviewed, reversed, and set aside.

2. That the plaintiff's claim for supplemental security income be allowed, or in the alternative, that the case be remanded for further proceedings.

3. That the defendant be ordered to make payment of the claim to the plaintiff in accordance with the law, plus the costs of this action.

4. That the Court award such other and further relief as it deems just and proper.

Dated: June 8, 1984

/s/ John Ohanian
John Ohanian Inc.
Attorney for the Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 84-4317-MRP(K)
(Caption Omitted In Printing)
DEFENDANT'S SUPPLEMENTAL MEMORANDUM

The Appeals Council has agreed, upon review to a voluntary remand for further administrative proceedings in this case. A Stipulation for Voluntary Remand was requested of plaintiff's attorney but he would not agree to so stipulate. Defendant hereby requests that the Court, in its discretion and pursuant to plaintiff's prayer for relief in his complaint, order this case be remanded pursuant to the Appeals Council decision to review for further administrative proceedings.

DATED: This 18th day of December, 1984.

Respectfully submitted,

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ Evelyn M. Matteucci
EVELYN M. MATTEUCCI
Assistant United States Attorney

Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. CV 84 4317 MRP-K
(Caption Omitted In Printing)
PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION FOR VOLUNTARY REMAND

When the plaintiff appealed to the Secretary's Appeals Council for review of Administrative Law Judge Harry C. Kessel's decision denying the plaintiff's disability, the Appeals Council advised that there was no basis under the regulations to grant review, (Tr. 2), and that if he wished to appeal, he should bring action in U.S. District Court.

Now that the plaintiff has followed the Secretary's advice and appealed to the District Court, the Secretary appears to have changed her position, in that she requests "voluntary remand for further administrative proceedings." The Secretary however does not admit error or indicate what will happen in the course of administrative proceedings. The Secretary's vague reference presents the real possibility of returning to Judge Kessel for another installment of error ridden and grossly defective proceedings. Plaintiff does not particularly welcome such a prospect.

Counsel for plaintiff believes that the record is complete, and that plaintiff has proved his disability based on his application of May 28, 1982. Counsel knows of nothing that remains to be done, except for the Secretary to order payment of benefits. Counsel sees no advantage in regressing to a lower level of review; our judicial system is structured for appeal to a higher level of review for a

dissatisfied claimant such as the plaintiff. Since the Secretary is not yet inclined to order payment of benefits to the plaintiff, he has no choice but to appeal to the Court to order payment of benefits.

The plaintiff therefore prays that the Court will reject the Secretary's request and grant the plaintiff's motion for summary judgement.

Dated: December 27, 1984.

Respectfully submitted,

John Ohanian Inc.

By: /s/ John Ohanian
John Ohanian
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. CV 84 4317 MRP(K)
(Caption Omitted In Printing)

EX PARTE APPLICATION
TO REMAND: AND ORDER

On December 18, 1984, defendant filed a supplemental memorandum advising that the Appeals Council had agreed to a voluntary remand for further administrative proceedings in this case.

On December 27, 1984, plaintiff filed an objection to the defendant's motion for voluntary remand, with the expectation that the Magistrate would promptly issue his report and recommendation.

Plaintiff advises that his breathing problem has worsened and that his wife is seriously ill, so that he is confronted with considerable medical expenses and is anxious to have this matter concluded. In the event a favorable decision issued in this case, plaintiff would receive funds that could be used for medical expenses.

In view of the mentioned circumstances, counsel for plaintiff files this *ex parte* application for an order remanding this case to the defendant, with the belief that this will expedite resolution of the plaintiff's claim. Since plaintiff does not know when the Magistrate may issue his report and recommendation in this case, plaintiff asks the Magistrate to use his discretion and either issue his

report and recommendation, or remand the cause to the Secretary.

Dated: March 28, 1985

Respectfully submitted,

John Ohanian Inc.

By: /s/ John Ohanian
John Ohanian
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 84-4317-MRP(K)
(Caption Omitted In Printing)
JUDGMENT

Defendant's motion to remand, concurred in by plaintiff, is granted. The matter is remanded to the Secretary for all further proceedings.

DATED: This 3 day of April, 1985.

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States District
Judge

DEPARTMENT OF HEALTH &
HUMAN SERVICES Social Security Administration

Office of Hearings and Appeals
PO Box 3300
Arlington VA 22203

MAY 07 1985

John Ohanian
Attorney at Law
548 S. Spring St., Suite 302
Los Angeles, CA 90013

Dear Mr. Ohanian:

Re: Zakhar Melkonian vs. Secretary of HHS
U.S.D.C. for the Central District of California
Civil Action Number CV-84-4317 MRP(K)

Enclosed is a copy of the Appeals Council's decision holding that the claimant qualifies as a disabled individual under title XVI of the Social Security Act. We have released the claim file and a copy of the enclosed decision to the Social Security Administration, Assistance Program Branch, Attention: Appellate Reversal, 100 Van Ness, 22nd Floor, San Francisco, CA 94102 which is responsible for authorizing supplemental security income payments. Any inquiries about payment should be directed to that office; however, before benefits may be paid a determination must be made as to whether the income and resource provisions of the Act are met. The component of the Social Security Administration Responsible for authorizing supplemental security income benefits will advise you and the claimant regarding these non-disability requirements and, if eligible, the amount and the month or months for which payment will be made.

Social Security Administration Regulations provide that an attorney who wishes to recieve [sic] a fee for services performed in a proceeding before the Social Security Administration must file a petition. The enclosed snapout form petition is designed to elicit the required information, and instructions for completing the form appear on its reverse side.

When your services are concluded, please complete the enclosed petition form, furnish your client with the CLAIMANT'S COPY, retain the REPRESENTATIVE'S COPY for your records, and send the remaining copies directly to Attorney Fee Staff, Office of Hearing & Appeals, SSA, P. O. Box 3200, Arlington, Virginia 22203. To insure that the material is sent directly, please put "Do Not Open in the Mail Room" on the envelope.

Sincerely yours,

/s/ Harriet A. Simon
Harriet A. Simon
Member, Appeals Council

Enclosures

cc:
Zakhar Melkonian
3346 Griffith Park Blvd.
Los Angeles, CA 90027

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of	**Claim for**
Zakhar Melkonian (Claimant)	Supplemental Security Income
	562-61-9367 (Social Security Number)

This case is before the Appeals Council following remand from the United States District Court for the Central District of California (Civil Action Number CV-84-4317 MRP(K)). Therefore, the Appeals Council hereby vacates its denial of the claimant's request for review and the administrative law judge's decision of January 30, 1984.

In that decision, the administrative law judge found that the cliamn [sic] did not have a severe impairment and that he was, therefore, not disabled on the basis of an application filed on May 28, 1982.

Subsequently, on May 30, 1984, the claimant filed a second application of supplemental security income. On the basis of evidence obtained in connection with the second application, the Disability Determination Service (DDS) of the state of California determined that the claimant is limited to medium work and that, considering his age, education, and relevant work experience, rule 203.10 of Table 3, Appendix 2, Subpart P, of Social Security Administration Regulations No. 4 directs a finding that the

claimant has been disabled since May 30, 1984. The determination that the claimant is limited to medium work was based on a report of pulmonary function studies that were conducted on April 25, 1984, and an opinion by a physician designated by the Secretary, dated June 7, 1984, that the pulmonary functions studies established a capacity for medium work. Those two medical reports are hereby entered into the record as Exhibits AC-1 and AC-2, respectively.

After consideration of all the evidence now of record, the Appeals Council concurs with the assessment of the claimant's functional capacity that was made by the physician designated by the Secretary. Therefore, the Council finds that at all pertinent times the claimant has been limited to the performance of medium work by his pulmonary impairment.

The claimant was born on May 10, 1925, and has been of "advanced age", as that term is defined in the Regulations, at all pertinent times.

The claimant attended school through the 6th grade in Syria and is illiterate and unable to communicate in English.

The only work that the claimant has performed in the relevant past was 2 hours per day as a laborer in a Bakery in the Soviet Union. That work was not substantial gainful activity, as defined in sections 416.974 of Social Security Administration Regulations No. 16, and cannot, therefore, be considered past relevant work. Thus, the Appeals Council finds that the claimant has no past relevant work.

The claimant has not engaged in substantial gainful activity since May 28, 1982. His impairment, emphysema, is severe but does not meet or equal in severity in impairment listed in Appendix 1, Subpart P, of Regulations No. 4. The claimant has no past relevant work.

The claimant is limited to medium work. Considering the claimant's age, education, and lack of relevant work, together with his residual functional capacity, rule 203.10 of Table 3, Subpart P, Regulations No. 4 directs a finding that the claimant has been disabled since May 28, 1982.

It is the decision of the Appeals Council that, based on the application filed on May 28, 1982, the claimant has been disabled under section 1614(a)(3) of the Social Security Act.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the non-disability requirements and, if eligible, the amount and the month(s) for which payment will be made.

APPEALS COUNCIL

/s/ Harriet A. Simon
Harriet A. Simon, Member

/s/ John W. Wojchiechowski
John W. Wojchiechowski, Member

DATE: MAY 07 1985

DEFENDANT'S ATTACHMENT A

DEPARTMENT OF HEALTH &
HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Baltimore MD 21235

May 31, 1985

United States Attorney
1100 U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

Dear Sir:

Re: Zakhar Melkonyan v. Secy. of HHS
C.D. of CA Civil No. 84 4317

(SSN: 562-61-9367

(Our ref: GC:SS:BBesser)

The above case was remanded to the Secretary of Health and Human Services by court order.

✓ The Appeals Council has issued a decision favorable to the plaintiff. If appropriate, have the action discontinued or dismissed.

___ The Appeals Council has issued a decision which holds that plaintiff is not entitled to Social Security benefits.

___ The transcript of the record and our suggestion for answer will be forwarded as soon as prepared.

___ Copies of the supplemental transcript or the record and our comments will be forwarded as soon as prepared.

___ The Appeals Council has issued a partially favorable decision.

___ Plaintiff's attorney indicated his desire to continue the litigation.

___ We have been advised that the plaintiff does not wish to continue with the litigation. Please obtain an order of dismissal.

___ On ___ we requested that a remand be obtained. We have not yet been advised.

Sincerely yours,

Randolph W. Gaines
Deputy Assistant General Counsel
for Litigation

/s/ Betty Besser
Betty Besser
Legal Technician

✓ Copy of A/C decision
___ Copy of pl's att'y ltr

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. CV 84-4317-MRP(K)

(Caption Omitted In Printing)

FINDINGS ON AN APPLICATION FOR ATTORNEY'S FEES

These findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C. § 636 and General order 194 of the United States District Court of the Central District of California.

On June 8, 1984, plaintiff by counsel filed this complaint seeking review of the decision of the Secretary denying social security benefits. 42 U.S.C. § 405(g). The Magistrate ordered further proceedings and on October 18, 1984, plaintiff filed a motion for summary judgment. Defendant filed its cross motion on November 20th. Plaintiff filed a reply brief on December 4th to which defendant filed a supplemental memorandum on December 18th indicating that the Secretary was granting a voluntary remand. On December 27, 1984, plaintiff filed objections to the motion for voluntary remand seeking a decision on the merits. On April 1, 1985, plaintiff withdrew his objections and the matter was subsequently remanded by order of the court. On May 7th, the Secretary issued a favorable decision. (Deft. Oppo. Exh. A.)

Plaintiff now seeks attorney's fees under the Equal Access to Justice Act. 28 U.S.C. § 2412(d).

A prerequisite to an award of fees and expenses under the Equal Access to Justice Act is a finding by the

court that the position of the United States was not substantially justified and that there are no special circumstances making such an award unjust. 28 U.S.C. § 2412(d)(1)(A). In addition, the application must be filed within 30 days of final judgment. § 2412(d)(1)(B).

The evidence of the favorable award before the court indicates that the plaintiff who had filed his first application for benefits on May 28, 1982 filed a second application on May 30, 1984 and "[o]n the basis of evidence obtained in connection with the second application, the Disability Determination Service ("DDS") of the State of California determined that the claimant is limited to medium work and that, . . . Rule 203.10 of Table 3, . . . directs a finding that the claimant has been disabled since May 30, 1984." The award goes on to state that the determination "was based on a report of pulmonary function studies which were conducted on April 25, 1984, and an opinion by a physician designated by the Secretary dated June 7, 1984, ... " The Secretary then made a finding that the plaintiff had been disabled since May 26, 1982 "based on the application filed on May 26, 1982, . . . " (Defendant's Oppo., Exh. A.)

It appears from the record before the court that the Secretary reconsidered plaintiff's claim based upon new evidence.[1] Therefore this award is not a basis for finding that his original position was not "substantially justified."

---

[1] See Plaintiff's Memo in Support, filed October 18, 1984, Exh. A.

The Magistrate has reviewed the administrative record submitted to the Secretary in support of the original application and finds that it does not justify a finding that the original decision of the Secretary denying benefits was substantially unjustified. The medical reports in that record do not indicate disability as defined under the Act. (Admin. Rec. pp. 42-43, 92-96.)[2]

It is the conclusion of the Magistrate that it cannot be said from the evidence of record that the position of the government was not substantially justified.

IT IS THEREFORE RECOMMENDED that the Court enter an Order denying the request for fees.

DATED: This 12th day of February, 1987.

/s/ John R. Kronenberg
JOHN R. KRONENBERG
United States
Magistrate

---

[2] 20 C.F.R. 404.1520(c) was declared invalid by the Ninth Circuit on September 10, 1985. *Yuckert v. Secretary*, 774 F.2d 1364 (9th Cir. 1985). This was based on a finding that it was inconsistent with 42 U.S.C. 423(d)(2)(A) of the Social Security Act. A similar statute governs Supplemental Security Income (SSI), 42 U.S.C. 1382c(a)(3)(B). The Secretary's first decision applied 20 C.F.R. 416.920(c) which insofar as material here, is identical with 404.1520(c). The *Yuckert* decision came some 17 months after the final decision of the Secretary in the instant case (April 9, 1984). The Magistrate believes that the latter was substantially justified under a reasonable interpretation of the the regulations then in effect.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 84-4317-MRP(K)
(Caption Omitted In Printing)
JUDGMENT DENYING ATTORNEY'S FEES

IT IS ADJUDGED that the request for attorney's fees is denied.

DATED: This 17 day of February, 1987.

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZAKHAR MELKONYAN, Plaintiff-Appellant, vs. OTIS R. BOWEN, Secretary of Health and Human Services, Defendant-Appellee.	No. 87-5716 DC# CV-84-4317-MRP Central California ORDER Filed July 30, 1987

Appellant apparently failed to satisfy the requirements of 28 U.S.C. § 2412(d), when he filed an application for attorney fees over one year after judgment was rendered in the district court. Therefore, it is unclear whether the district court had jurisdiction to entertain appellant's motion for fees. Within 21 days of entry of this order, appellant shall voluntarily dismiss the appeal or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to respond, appellee may reply within 14 days of the filing of the response.

For the Court:

/s/ Meredith J. Watts
Meredith J. Watts
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 87-5716
(Caption Omitted In Printing)

STIPULATION OF PARTIES IN RESPONSE TO ORDER OF MARCH 22, 1989

In response to the Court's Order of March 22, 1989, the parties hereby stipulate as follows:

1. Appellant, Mr. Melkonyan, was issued a payment of $7,910.39 on September 17, 1985, pursuant to the Appeals Council's decision of May 7, 1985. Issuance of this payment is supported by a copy of the United States Treasury check in the above-stated amount, issued September 17, 1985, supplied by Mr. Melkonyan (copy attached);

2. The $7,910.39 payment in September 1985 covered benefits due Mr. Melkonyan for the period of May 1982 through May 1984, as reflected in the attached computerized printout and the attached letter from Donald Mings of the Social Security Administration ("SSA"). The two separate payment columns in the computer printout reflect the Federal and State portions of the supplemental security income ("SSI") payments ($3,816.71 in one column plus $4,093.68 in the other column equals a total of $7,910.39);

3. Neither party has been able to provide a copy of a letter or determination of the benefit amounts preceding or accompanying the September 1985 benefit payment. Mr. Melkonyan does not have a copy of a letter or decision and SSA has not been able to locate the claims

file. In any event, SSA has indicated to counsel for the Secretary that the file is unlikely to contain a letter or decision, because the letter advising claimant of the payment would have been computer-generated and SSA likely would not have retained a hard copy of the letter in the file;

4. Mr. Melkonyan has provided a copy of an August 9, 1984 letter (and two subsequent letters of November 26, 1984 and June 11, 1985) he received informing him of the amount of benefits to be paid for the period subsequent to May 1984 on the basis of an SSI application filed on May 30, 1984, while the SSI application of May 28, 1982 at issue in the instant case was being litigated on the merits in the District Court (copies attached). Although these letters are unrelated to the award of benefits for the period previous to May 30, 1984 covered by the Appeals Council's decision of May 7, 1985, the letters indicate the type of information that would have been provided Mr. Melkonyan in a letter at or about the time of the September 1985 payment, except for the explanation of Mr. Melkonyan's appeal rights provided on the reverse side of the letters (as indicated on the front of the attached letters);

5. Mr. Melkonyan sought no further administrative or judicial review in connection with the amount of

benefits determined in September 1985 pursuant to the Appeals Council's decision of May 7, 1985.

Respectfully submitted,

Dated: April 3, 1988

/s/ Michael R. Power
MICHAEL R. POWER
Attorney for Appellee

Dated: April 4, 1988

/s/ John Ohanian
JOHN OHANIAN
Attorney for Appellant

United States Court of Appeals,
Ninth Circuit.

Zakhar MELKONYAN,
Plaintiff-Appellant,

v.

Margaret M. HECKLER, Secretary of HHS,
Defendant-Appellee.

No. 87-5716.

Argued and Submitted Jan. 10, 1989.

Submission Withdrawn March 22, 1989.

Resubmitted April 5, 1989.

Decided Jan. 31, 1990.

Before WALLACE, CANBY and TROTT, Circuit Judges.

ORDER

The opinion filed in the above case on June 30, 1989, is withdrawn.

OPINION

WALLACE, Circuit Judge:

Melkonyan appeals from the district court's judgment denying his application for attorney's fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Melkonyan challenges the court's conclusion that the position taken by the Secretary of Health & Human Services (Secretary) was "substantially justified." Because Melkonyan's EAJA application was not filed within the

jurisdictional time limit, we vacate the judgment and remand for dismissal by the district court.

I

On May 28, 1982, Melkonyan filed an application for supplemental security income (SSI) disability benefits under Title XVI of the Social Security Act (Act). 42 U.S.C. §§ 1381 *et seq*. The application was denied. After a hearing, an administrative law judge (ALJ) again denied the application, determining that Melkonyan was not disabled within the meaning of the Act. The Appeals Council affirmed the ALJ's decision on April 9, 1984. On June 8, 1984, Melkonyan filed a complaint in district court seeking review pursuant to 42 U.S.C. § 1383(c)(3), which incorporates the judicial review provisions of 42 U.S.C. § 405(g).

Meanwhile, on May 30, 1984, Melkonyan filed a new application for SSI disability benefits supported by new evidence of disability. He learned on August 9, 1984, that this application was approved.

On October 18, 1984, Melkonyan filed a motion in district court for summary judgment, which included the new evidence of his disability. The Secretary offered and Melkonyan refused a stipulated remand for further administrative proceedings. The Secretary then moved for a court-ordered remand pursuant to 42 U.S.C. § 405(g), which Melkonyan initially opposed and then supported. On April 5, 1985, the district court entered its order to remand.

On May 7, 1985, the Appeals Council vacated the ALJ's decision rejecting Melkonyan's original application, and determined that he was disabled as of the date of his original application. The determination of Melkonyan's benefits occurred on September 11, and he was paid on September 17, 1985. Melkonyan sought no further administrative or judicial review in connection with the award of benefits.

On May 19, 1986, Melkonyan filed a motion in district court for attorneys' fees and costs in a civil action against the United States pursuant to the EAJA, 28 U.S.C. § 2412(d). The Secretary opposed on the grounds that Melkonyan was not a "prevailing party," and that even if he were, the government's position had been "substantially justified." The court denied Melkonyan's request, holding that the government's position had been substantially justified. This appeal followed.

II

28 U.S.C. § 2412(d)(1)(A) provides that a party prevailing in a suit against the United States or one of its agencies should receive attorneys' fees, costs, and other expenses incurred in the civil action "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id*. A party requesting such an award must submit an application to the court "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). The 30-day time limit is jurisdictional. *See Papazian v. Bowen*, 856 F.2d 1455, 1455-56 (9th Cir.1988) (*Papazian*); *Barry v. Bowen*, 825 F.2d 1324, 1327-29 (9th

Cir.1987); *see also MacDonald Miller Co. v. NLRB*, 856 F.2d 1423, 1424 (9th Cir.1988) (so construing 30-day time limit in another section of the EAJA); *Columbia Manufacturing Corp. v. NLRB*, 715 F.2d 1409, 1410 (9th Cir.1983) (same). Final judgment in this context means "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G). This definition applies to Melkonyan's case, which was pending when the definition was revised by amendments to the EAJA on August 5, 1985. Equal Access to Justice Act, Extension and Amendment, Pub.L. No. 99-80 § 7(a), 99 Stat. 183, 186 (1985) (EAJA Extension Act); *see McQuiston v. Marsh*, 790 F.2d 798, 800 (9th Cir.1986) (*McQuiston II*).

We must first consider the threshold jurisdictional question whether Melkonyan submitted his request within 30 days of final judgment, as defined by the EAJA Extension Act. The problem lies in identifying the relevant "judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G). We interpret the EAJA de novo. *Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir.1988).

The district court order remanding to the agency for further administrative proceedings was not a final judgment for purposes of 28 U.S.C. § 2412(d)(1)(B). *Papazian*, 856 F.2d at 1455-56. There, an ALJ rejected Papazian's application for disability benefits under Title II of the Social Security Act on the grounds that Papazian was not disabled. *Id.* at 1455. The Appeals Council affirmed by denying review. *Id.* Papazian sought judicial review, but while his complaint was pending in district court, the parties agreed to a court order remanding for "further administrative proceedings." *Id.* at 1455-56. On remand, the Appeals Council found Papazian disabled and

awarded him benefits. The district court concluded that Papazian's subsequent petition for fees was untimely because the 30 days since the remand order had expired. *Id.*

We reversed because neither the parties nor the district court intended the remand to end the litigation, particularly in light of the reference to "further administrative proceedings." *Id.* at 1456. Similarly, both parties here expected further administrative proceedings to follow the remand. Thus, the district court order of remand was not a "judgment that is final and not appealable" and therefore did not trigger the 30-day period. *See also Swenson v. Heckler*, 801 F.2d 1079, 1080 (9th Cir.1986) (holding that claimant who obtains order of remand not entitled to EAJA fees, but basing decision on "prevailing party" rather than "finality"); *Singleton v. Bowen*, 841 F.2d 710, 711-12 (7th Cir.1988) (same).

In *Papazian*, after the Appeals Council awarded the claimant benefits, the district court adopted the decision and entered it as its own judgment. 856 F.2d at 1455. We looked to this district court judgment, rather than the Appeals Council's award of benefits on remand, in determining what constituted the final judgment for purposes of section 2412(d)(1)(B). *Id.* at 1455-56. Here, however, the district court entered no such judgment. We are faced with a problem not confronted by us in *Papazian*: If the remand order lacks finality, and there is no subsequent district court order, what event triggers the 30-day time limit prescribed by 28 U.S.C. § 2412(d)(1)(B)? We are forced to resolve this problem because our jurisdiction rests on its outcome.

Pursuant to 28 U.S.C. § 2412(d)(1)(B), the 30-day time limit is triggered by a "final judgment in the action." Section 2412(d)(2)(G) goes on to define a "final judgment" as "a judgment that is final and not appealable." On May 7, 1985, the Appeals Council vacated the ALJ's original decision rejecting Melkonyan's application, and determined that he was disabled as of the disability onset date that he alleged in his original application. We must determine whether this decision constituted a "final judgment" within the meaning of section 2412(d)(2)(G) and triggered the 30-day period for seeking EAJA fees under section 2412(d)(1)(B).

As we held in *McQuiston II*, the 30-day period does not begin to run until the time to appeal expires. 790 F.2d at 800. Ordinarily, this means that the 30-day period will start 65 days after the date on the notice of the Secretary's determination of eligibility for benefits. *See* 20 C.F.R. §§ 416.1401, 1481, 1483 (1988) (60 days to seek district court review of the Appeals Council decision, plus 5 days between date of notice and date notice deemed received). However, where, as here, the Secretary determines that the claimant was disabled as of the disability onset date that the claimant alleged in his original application, the 30-day period begins to run immediately upon the decision of the Appeals Council. This rule is appropriate because the Secretary's decision is "not appealable" by either the claimant or the Secretary. We do not need to address the question of when the Secretary's remand decision which is either partially favorable or unfavorable to a claimant becomes a final judgment.

The decision by the Appeals Council constitutes the final decision of the Secretary. *Sullivan v. Hudson*, ___ U.S. ___, 109 S.Ct. 2248, 2252, 104 L.Ed.2d 941 (1989). Section 405(g) entitles only an "individual" to appeal the Secretary's decision. *Jones v. Califano*, 576 F.2d 12, 18 (2d Cir.1978). Thus, the Secretary would not have standing or reason to complain of his own final decision. Likewise, if a claimant wholly prevails on his claim, he would have no reason to appeal that decision.

We, therefore, conclude that the "final judgment" in Melkonyan's action was rendered on May 7, 1985. But Melkonyan did not move for EAJA fees until more than one year after this "final judgment." The district court therefore lacked subject matter jurisdiction to entertain his application. 28 U.S.C. § 2412(d)(1)(B); *Papazian*, 856 F.2d at 1455-46 [sic]. Accordingly, we do not reach the question whether the government's position was substantially justified. Instead, we vacate and remand to the district court for dismissal.

In making our decision, we are confronted with what appears to be a different approach to this problem by a sister circuit. In *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir.1983) (*Guthrie*), the Fourth Circuit ordered the district court to direct the Secretary to make the filing 42 U.S.C. § 405(g) describes. *Id.* at 106. After this filing, the Fourth Circuit directed the district court to enter a final judgment so that the section 2412(d)(1)(B) 30-day period would begin. *Id.*; *accord Brown v. Secretary of Health & Human Services*, 747 F.2d 878, 884-85 (3d Cir.1984); *see also* H.R.Rep. No. 120, 99th Cong., 1st Sess., pt. 1 at 19-20 (1985), *reprinted in* 2 1985 U.S.Code Cong. & Admin.News 132, 148 (legislative history of 1985 amendments to EAJA stating that neither remand to agency nor agency decision

after remand constitutes final judgment; approving *Guthrie* and *Brown* holdings that district court order after Secretary makes required post-remand filing constitutes "final judgment" triggering 30-day period).

Guthrie's approach is troublesome. While section 405(g) requires the Secretary to file the new decision and findings after remand, it does not confer upon the district court any independent power to review the post-remand filing. The agency's decision may be reviewed by the district court only if a claimant appeals within the 60-day time limit. *See* 42 U.S.C. § 405(g); 20 C.F.R. §§ 416.1401, 1481 (1988). The Secretary's post-remand decision is reviewable only to the extent that the agency's original decision and findings were reviewable. 42 U.S.C. § 405(g). Unless the ordinary procedural requirements for judicial review of an agency decision are met, we are at a loss to find a basis for the district court to enter any order or judgment affirming, modifying, reversing or remanding the Secretary's post-remand filing. Nor do we see any advantage to such an approach. Established procedures already allow a claimant dissatisfied with the Secretary's decision on remand to secure judicial review. 20 C.F.R. §§ 416.1401, 1481 (1988). In such a case, the section 405(g) requirement that the Secretary furnish the findings, decision, and record supplements the claimant's appeal. If the Secretary's decision is wholly in favor of the claimant, we are hard pressed to see a need for the overburdened district courts to deploy scarce judicial resources in a sua sponte "affirmation" of uncontested eligibility decisions.

More importantly, *Guthrie* was decided before the 1985 EAJA amendment which effectively redefined "final

judgment" as "a judgment that is final and not appealable." *See* 28 U.S.C. § 2412(d)(2)(G); *McQuiston II*, 790 F.2d at 800. *Guthrie* explicitly relied on the "common usage" definition of final judgment articulated in *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir.1983), which *McQuiston II* held had been overruled by the 1985 amendment. *McQuiston II*, 790 F.2d at 800; *Guthrie*, 718 F.2d at 106. The Fourth Circuit assumed that final judgment meant the type of judgment provided under Fed.R.Civ.P. 54, a judgment only a court could enter. 718 F.2d at 106. Thus, only a court's judgment could be a final judgment triggering the 30-day period to submit an application for EAJA fees. *Id.* The revised statute, aside from its use of the term "judgment," gives us no reason to think that this is so. *See* 28 U.S.C. §§ 2412(d)(1)(B) & (d)(2)(G). It does not appear, therefore, that we should interpret "judgment" in this context as requiring a judgment by a court. For these reasons, we do not remand this case ordering the district court to enter a final judgment with the thought that the section 2412(d)(1)(B) 30-day period would begin.

Our approach not only sets definite limits for purposes of finality, but it also benefits individuals seeking EAJA awards under section 2412 in similar circumstances. Rather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district court, such individuals may seek EAJA awards as soon as the agency's action on remand becomes a "final judgment" under section 2412(d)(2)(G).

We therefore vacate the judgment of the district court and remand this case for dismissal for lack of subject matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZAKHAR MELKONYAN, Plaintiff-Appellant, -vs- MARGARET M. HECKLER, SECRETARY OF HHS, Defendant-Appellee.	No. 87-5716 D.C. No. CV-84-4317-MRP ORDER DENYING REHEARING Filed May 29, 1990

Appeal from the United States District Court for the Central District of California

Before: WALLACE, CANBY, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

SUPREME COURT OF THE UNITED STATES

No. 90-5538

Zakhar Melkonyan,

Petitioner

v.

Louis W. Sullivan, Secretary of Health and Human Services

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

No. 90-5538

In The

Supreme Court of the United States

October Term, 1990

ZAKHAR MELKONYAN,

Petitioner,

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

(1) In a Social Security case that has been remanded to the agency by the district court, does the "final judgment in the action," from which the 30-day statute of limitations for the filing of an attorney's fee application under the Equal Access to Justice Act runs, commence with the district court judgment issued after all administrative proceedings have been completed, rather than with the administrative decision of the agency after remand?

(2) If not, should that ruling be given prospective effect only because the decision below was directly contrary to (a) all then-existing precedent, (b) all of the agency's pronouncements on the subject, and (c) the position taken in this litigation by respondent, who did not take the position he now asserts until the issue was raised *sua sponte* by the court of appeals?

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OPINIONS BELOW

The opinion of the court of appeals (JA 27-36) is reported at 895 F.2d 556 (9th Cir. 1990). The judgment of the district court (JA 22) and the findings and recommendation of the magistrate (JA 19-21) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1990. The order denying rehearing and rehearing *en banc* was entered on May 29, 1990 (JA 37). The petition for a writ of certiorari was filed on August 23, 1990, and was granted on January 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412, are involved:

> **(d)(1)(A)** Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. * * *

(2) For the purposes of this subsection – * * * (G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement * * *

STATEMENT OF THE CASE

On May 28, 1982, petitioner Zakhar Melkonyan filed an application for Supplemental Security Income ("SSI") on the basis of disability under Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq*. Petitioner alleged disability primarily on the basis of his chronic asthma and bronchitis, but he also presented evidence of hypertension, chest pain, attacks of dizziness, and mild obesity (Administrative Record ("R") 9, 92-102). His claim was further supported by his age (58), his lack of formal education (fourth grade), his inability to speak and understand the English language, his poor work history (R 56-64), and his personal physician's opinion that he could not work (R 103-04).

On October 11, 1983, a twenty-two minute hearing was held before an Administrative Law Judge ("ALJ"), at which petitioner proceeded *pro se*. Testifying through an interpreter, petitioner stated that, from 1949 through 1956, he had been a political prisoner in Siberia, and, from 1956 until his emigration to the United States in 1980, he had worked two hours per day putting bread into an oven for the Soviet Army (R 17-18). He testified that he had breathing problems and dizziness while working in the Soviet Union and that these problems persisted, exacerbated by three to four asthma attacks per day, with more frequent attacks at night, and an inability to walk more than a block without rest (R 18-20). Petitioner's wife, testifying in broken English, confirmed petitioner's testimony and explained that petitioner was unable to do household chores, that his dizziness and shortness of breath were chronic (R 22-23), and that he had worked for only two hours per day in the Soviet Union because "he could not stand on his feet and was dizziness [sic]" (R 22). Finally, in response to the ALJ's inquiry as to why petitioner was "spitting up" at the hearing, she explained that it was the result of a persistent "very nervous condition" (R 23).

Despite this evidence, the ALJ held that petitioner's conditions were not "severe" within the meaning of the regulations promulgated by respondent Secretary of Health and Human Services (the "Secretary") and, thus, denied petitioner's SSI application. The "severity regulation," to which the ALJ had referred, is a threshold determination in the Secretary's five-step sequential evaluation process (*see* 20 C.F.R. § 416.920), which allows

him to deny applications concerning solely those impairments that do not "significantly limit [the claimant's] physical or mental ability to do basic work activities . . . ." 20 C.F.R. § 416.920(c). Review before the Secretary's Appeals Council was denied on April 9, 1984 (JA 4). Thereafter, petitioner obtained counsel and filed a timely complaint in district court seeking review of the Secretary's decision.

On October 18, 1984, petitioner filed a motion for summary judgment. In his supporting brief, he argued that the evidence in the record supported a finding of disability and, in the alternative, that the ALJ had not met his legal obligation to fully and fairly develop the record, a requirement that is heightened when a claimant, such as petitioner, is proceeding *pro se*. The Secretary cross-moved for summary judgment, but shortly thereafter, on December 18, 1984, filed a "Supplemental Memorandum" requesting that the court remand the case to the Appeals Council for further proceedings to allow the Appeals Council to review new evidence not previously in the record (JA 6, 14-16).

Petitioner initially opposed a remand, believing that further proceedings would only engender delay and not result in a finding of disability (JA 7-8). On April 3, 1985, however, still without a decision from the district court, petitioner moved the court to either "issue [the decision], or remand the cause to the Secretary" (JA 9-10). In so moving, petitioner explained that his previous objection to a remand had been made on the assumption that the court would promptly make its decision, and that his new position was premised on the facts that his medical conditions had worsened and that he was facing increased

medical expenses. On April 5, 1985, the case was remanded to the Secretary for further administrative proceedings (JA 11).

On May 7, 1985, considering evidence that petitioner had submitted in conjunction with a second SSI application filed on May 30, 1984 (JA 14), the Appeals Council vacated the ALJ's prior decision and found petitioner disabled as of the date of his original SSI application (JA 14-16). The Appeals Council held that petitioner's age, lack of schooling, illiteracy, poor work history, and restriction to a "medium" level of exertion – all of which were supported by evidence in the original record – mandated a finding of disability.

On June 10, 1985, the Secretary's Office of General Counsel informed the U.S. Attorney handling the district court action "that the Appeals Council has issued a favorable decision" and that, therefore, "[i]f appropriate, [you should] have the action discontinued or dismissed" (JA 17). The U.S. Attorney, however, took no action. More than three months later, a check was issued to petitioner for $7910.39, representing retroactive benefits dating from his original SSI application (JA 24-26).

On May 18, 1986, although the U.S. Attorney still had not taken any action following the remand, or even informed the court of the Appeals Council's decision, petitioner moved in the district court for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). On July 10, 1986, the Secretary opposed the motion on the ground that his position on the merits was substantially justified, but at no time did he argue that the fee application was untimely.

In a brief recommendation, the Magistrate found that fees should not be awarded because "it cannot be said from the evidence of record that the position of the government was not substantially justified" (JA 21). Shortly thereafter, the district court assumed jurisdiction over the application and, in a one-line judgment, denied petitioner's request (JA 22).

Petitioner appealed to the Ninth Circuit, and the parties fully briefed the substantial justification issue. On July 30, 1987, however, the Ninth Circuit clerk issued an order *sua sponte* stating that, because petitioner "filed an application for attorney fees over one year after judgment was rendered in the district court" (JA 23), he should either voluntarily dismiss his appeal or show cause why it should not be dismissed for lack of jurisdiction.

Thereafter, the parties briefed the timeliness issue, and the court of appeals, in an opinion entered on January 31, 1990, vacated and remanded the case to the district court with directions to dismiss the application as untimely. After reviewing the procedural history of the case, the court recited the statutory language that requires an EAJA applicant to file a fee petition "within thirty days of final judgment in the action," 28 U.S.C. § 2412(d)(1)(B), and noted that the EAJA's 1985 amendments define "final judgment" as "a judgment that is final and not appealable . . . ." *Id.* § 2412(d)(2)(G) (JA 32). The court of appeals acknowledged that it previously had held that the triggering event for the 30-day filing period was the district court judgment adopting a claimant-favorable Appeals Council decision, and not the district court's prior "order of settlement" remanding the case to the Appeals Council (JA 30-31). *See Papazian v. Bowen*, 856

F.2d 1455, 1455-56 (9th Cir. 1988). The court declined to follow that rule, however, because here the district court had never entered a judgment after remand (JA 31).

In contrast with its earlier order to show cause (JA 23), the court of appeals recognized that the district court's original remand order could not be a "final judgment" for EAJA purposes, since at that point the case lacked finality (JA 31). But it found against petitioner on the theory that a decision of the Appeals Council that is wholly favorable to a claimant is "the final judgment in the action" under 28 U.S.C. § 2412(d)(1)(B). Since petitioner's fee application was filed more than a year after this "final judgment," the court held that it was without "subject matter jurisdiction to entertain his application" (JA 33).

The court of appeals acknowledged that its holding was contrary to the leading precedent of a "sister circuit" and the EAJA's legislative history (JA 33, *citing Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1984)). Nevertheless, it rejected the Fourth Circuit's "assum[ption] that final judgment meant . . . a judgment only a court could enter," because the statute, *"aside from its use of the term 'judgment,'* gives us no reason to think that this is so" (JA 35) (emphasis added). Moreover, the court saw no "advantage to such an approach" because requiring mere "affirmations" of Appeals Council decisions would waste scarce judicial resources (JA 34).

SUMMARY OF ARGUMENT

The express language of the EAJA mandates that the 30-day period for the filing of an attorney's fee application does not begin to run until there is a final judgment of the court having jurisdiction over the application. 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(G). Congress' clear mandate is reaffirmed in the statute's legislative history and by the purposes of the EAJA. Indeed, the Secretary repeatedly had urged this interpretation of the statute prior to this case.

Now, the Secretary argues that certain fully favorable administrative decisions issued by the Social Security Administration, after remand from a district court, constitute "final judgments" triggering the 30-day filing period. That approach would engender unnecessary confusion over when, and what types of, post-remand decisions are "final" under the EAJA. This Court should thus reject the Secretary's position and hold, as the statute requires, that, in *all* cases, the 30-day clock does not begin to run until the district court has issued a post-remand judgment.

If, however, the Court upholds the ruling below, the decision should not be applied in this case. *See Chevron Oil v. Huson*, 404 U.S. 97 (1971). At the time that the Appeals Council decision was issued in petitioner's case, and indeed until the issuance of the decision below, all relevant precedent, as well as the Secretary's public pronouncements on the subject, supported petitioner's position that the EAJA's statute of limitations commences only after entry of a federal court judgment. Thus, retroactive application would be inequitable to petitioner and others similarly situated. *Chevron Oil*, 404 U.S. at 109; *American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323, 2336 (1990) (plurality opinion).

ARGUMENT

I. THE LANGUAGE, HISTORY, AND PURPOSES OF THE EQUAL ACCESS TO JUSTICE ACT MANDATE THAT THE THIRTY-DAY PERIOD FOR FILING A FEE APPLICATION COMMENCES ONLY AFTER THE ENTRY OF A COURT JUDGMENT, NOT THE DECISION OF AN ADMINISTRATIVE AGENCY.

A. Overview of the EAJA.

The EAJA was first enacted in 1980 as a three-year experiment "to diminish the deterrent effect of seeking review of, or defending against, governmental action." Pub.L. No. 96-481, § 202(c)(1), 94 Stat. 2325 (1980). The law permits the court to assess fees against the federal government to the same extent that attorney's fees would be available against a private party under the common law or by statute. 94 Stat. 2328 (codified at 28 U.S.C. § 2412(b)). The heart of the EAJA, however, is 28 U.S.C. § 2412(d). That provision mandates an award of fees to eligible parties who have prevailed against the federal government, unless the government can show that its position is "substantially justified or that special circumstances make an award unjust." *Id.* § 2412(d)(1)(A). Congress' goals in enacting § 2412(d) were to "encourag[e] private parties to vindicate their rights and [to] 'curb[] excessive regulation and the unreasonable exercise of Government authority.' " *Commissioner v. Jean*, 110 S.Ct. 2316, 2322 (1990) (*quoting* H.R. Rep. No. 1418, 96th Cong.,

2d Sess. 12 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4991).

In 1985, Congress reenacted the EAJA and made it permanent. In the process, Congress also fashioned amendments in order to restore its original purposes in certain areas. EAJA, Extension and Amendment, Pub.L. No. 99-80, 99 Stat. 183 (1985); H.R. Rep. No. 120, Pt. I, 99th Cong., 1st Sess. 1-11 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 132-39. Congress made clear, for instance, that fees were available in "any civil action," including "proceedings for judicial review of agency action . . . ." 28 U.S.C. § 2412(d)(1)(A). This represented an explicit rebuke of the Secretary's position that suits seeking review of Social Security disability determinations, such as petitioner's, did not come within the EAJA's purview. *See, e.g., Guthrie v. Schweiker*, 718 F.2d 104, 106-08 (4th Cir. 1983). Congress also provided that, in scrutinizing a substantial justification defense, the court must inquire into the reasonableness of the government's position both in the litigation and at the agency level. *Id.* § 2412(d)(2)(D); *see Jean*, 110 S.Ct. at 2319-20. The purpose here was to reject the government's view that it could escape liability by merely showing that its litigation position was reasonable, no matter how unreasonable the agency's underlying conduct. *See, e.g., Rawlings v. Heckler*, 725 F.2d 1192, 1195-96 (9th Cir. 1985).

This is the fourth EAJA case that this Court has reviewed in as many Terms. The first was *Pierce v. Underwood*, 487 U.S. 552 (1988), where the Court gave further definition to the substantial justification standard, held that district court rulings issued under that standard are subject to "abuse of discretion" review, and set the

parameters under which a court may enhance the $75 per hour statutory fee rate for "special factors" under 28 U.S.C. § 2412(d)(2)(A)(ii). The following Term, the Court held that work performed in conjunction with post-remand administrative proceedings in Social Security cases is compensable under the EAJA because such proceedings comprise part of the "civil action" for which fees are authorized under 28 U.S.C. § 2412(d)(1)(A). *Sullivan v. Hudson*, 109 S.Ct. 2248 (1989).

Just last Term, in *Jean*, 110 S.Ct. 2316, this Court held unanimously that once a court determines that the government's position on the merits is insubstantial, the government must pay the applicant's full fee on all of the fees issues on which the applicant prevails, without regard to whether the government's positions on those issues were "substantially justified." This decision was based not only on the statutory language, which indicates that only one "substantial justification" determination is required, but also on "the specific purpose of the EAJA . . . to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Id.* at 2321 (citing *Hudson*, 109 S.Ct. at 2253). The Court clearly was concerned with government attempts to undermine the EAJA's purposes, especially in Social Security cases, where the cost of fee litigation itself could outstrip the cost of litigating the merits. *Id.* at 2322 & n.12.[1]

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[1] Although the Secretary was not a party in *Jean*, the Secretary regularly had taken the position rejected there. *See, e.g., Trichilo v. Sec'y of HHS*, 823 F.2d 702, 708 (2d Cir. 1987); *Cornella v. Schweiker*, 741 F.2d 170, 172 (8th Cir. 1984).

B. The Plain Language and Structure of the EAJA Require Reversal.

Since its original enactment in 1980, the EAJA has provided that a party seeking fees under 28 U.S.C. § 2412(d) "shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection . . . ." 28 U.S.C. § 2412(d)(1)(B). A plain reading of this provision, making reference to a final *judgment*, and a fee application submitted to the *court*, is that Congress intended the 30-day period to commence when a final judgment is issued by the court in which the action was pending.

According to the Secretary, however, the "judgment" referred to in § 2412(d)(1)(B) is not the judgment of a court, but the decision of the Appeals Council on remand from the court. That conclusion is not based on the language Congress has chosen, nor on any of the standard legal definitions of a "judgment," which is defined as

> The official and authentic decision of a *court of justice* upon the respective rights and claims of the parties to *an action or suit* therein litigated and submitted to its determination. . . . The law's last word in a *judicial controversy*, it being the final determination by a *court* of the rights of the parties upon matters submitted to it in an action or proceeding.

Black's Law Dictionary 841-42 (6th ed. 1990) (emphasis added). Nowhere in any of Black's subsidiary definitions of "judgment" or its annotations is it suggested that the term extends to decisions of administrative tribunals (*see*

id.), let alone one from which judicial review lies. *See* 42 U.S.C. § 405(g) (review of Secretary's final decisions); 28 U.S.C. § 2412(d)(1)(A) (EAJA fees available in judicial "proceedings for review of agency action").

To be sure, the Secretary has found a definition of the term that includes, secondarily, the rulings of "other tribunals" (Opp. at 8, *quoting Webster's Third New International Dictionary* 1223 (1986)), but that is a definition aimed at laypersons. The Secretary himself concedes that " 'judgment' is also used as a term of art having special application to judicial proceedings" (Opp. at 8), but then does not explain why he has referred only to the definition offered by a source intended for laypersons, rather than a legal dictionary, whose sole purpose is to explain such terms of art.[2]

Furthermore, the entire structure of the EAJA reinforces petitioner's position. The juxtaposition of the phrase "final judgment in the action," immediately before the clause that requires the applicant to "submit to the court an application for fees and other expenses," 28 U.S.C. § 2412(d)(1)(B), most reasonably is construed to mean that it is the *court* whose *judgment* triggers the 30-day filing period. Moreover, the EAJA uses the term "judgment" at several other points, and each time it is

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[2] Indeed, many lay dictionaries, other than the one cited by the Secretary, also define "judgment" solely in terms of a court order. *See The Oxford English Dictionary* 294 (2d ed. 1989); *The Random House Dictionary of the English Language* 1036 (2d ed. unabridged 1987); *The American Heritage Dictionary of the English Language* 709 (1981); *Webster's New Twentieth Century Dictionary* 990 (2d ed. 1979).

equally clear that the "judgment" referred to is one rendered by a court. Thus, the statute's general costs provision, 28 U.S.C. § 2412(a), provides that "a judgment for costs, as enumerated in section 1920 of this title," may be awarded to any party prevailing against the United States "in any civil action" by "any court having jurisdiction of such action." While subsection (a) does not define "judgment," its reference to 28 U.S.C. § 1920 requires that a bill of costs must be "filed in the case," taxed by "the judge or clerk of any court of the United States," and then "included in the judgment or decree." 28 U.S.C. § 1920. This further supports the reading that, when the EAJA speaks of a "judgment," it does so in its ordinary usage, *i.e.*, a decree rendered by a court in a judicial proceeding.

The EAJA further provides, in 28 U.S.C. § 2412(c)(1), that a "judgment" for costs against the United States or its officers shall be paid as set out in 28 U.S.C. §§ 2414 and 2517. Those sections, in turn, make quite clear that a "judgment" is rendered only by a court of the United States. *See id.* § 2414 ("payment of final judgments rendered by a district court"); § 2517 (payment of "final judgment rendered by the United States Claims Court"). Finally, a "judgment" under 28 U.S.C. § 2412(b) – the part of the EAJA permitting an award of fees under common law principles – "shall be paid as provided in sections 2414 and 2517 . . . ." 28 U.S.C. § 2412(c)(2). Of course, the "judgment" referred to in these sections is the one for costs itself, not the decree from which the costs are sought. But what is critical here is that Congress used the same word repeatedly throughout the EAJA, and there simply is no reason, either express or implicit in the

EAJA's design, to depart from the common sense principle of statutory construction that multiple uses of the same word ought to be accorded the same meaning. *See* 2A *Sutherland Statutory Construction* § 47.16, p. 161 (Sands 4th ed. 1984).

Further evidence that Congress intended the term "judgment" to carry its ordinary meaning is found in 5 U.S.C. § 504, a provision of the EAJA which is not before the Court, but which allows an award of fees in administrative proceedings where the government is represented "by counsel or otherwise." *See id.* §§ 504(a)(1),(b)(1)(C); *Sullivan v. Hudson*, 109 S.Ct. at 2257. Section 504, enacted at the same time as the provisions at issue here, is the only part of the EAJA that allows fees and expenses for administrative proceedings conducted prior to the filing of a civil action. In a provision which otherwise mirrors 28 U.S.C. § 2412(d)(1)(B), section 504 states that a "party seeking an award of fees and other expenses shall, within thirty days of a *final disposition in the adversary adjudication,*" file an application for fees. 5 U.S.C. § 504(a)(2) (emphasis added). Congress, therefore, knew of, and properly employed, the term "judgment" when referring to the action of a court, and the term "final disposition" when it wanted to refer to administrative action.

Because Congress' use of the term "judgment" is so clear that it lends itself to no reasonable interpretation other than that offered by petitioner, it is this Court's duty to give effect to that language and reverse the decision of the court of appeals. *See Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

C. The Legislative History and Judicial Interpretations of the Original EAJA Support Petitioner's Position.

Like the language of the 1980 statute, its legislative history offers no support whatsoever for the Secretary's position. *See* S. Rep. No. 253, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984-5003. Indeed, in light of the statute's clarity, it is not surprising that the original enactment's legislative history on this issue is sparse. The little that there is, however, confirms petitioner's understanding that a court judgment is a necessary predicate to the commencement of the 30-day statute of limitations. S. Rep. No. 253, *supra*, at 7 (allowing fees after a voluntary dismissal and a settlement, as well as "a final judgment following a full trial on the merits"), 21 (same); H.R. Rep. No. 1418, *supra*, at 11, 18, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4990, 4997 (same).

Moreover, the case law prior to the 1985 reenactment is fully supportive of our position. The leading case is *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983), where a Social Security claimant sought judicial review of the Secretary's decision denying benefits. The parties agreed to a remand for further administrative proceedings, which resulted in a decision partially favorable to the claimant. *Id.* at 105. Thereafter, the Secretary filed the new decision and the transcript of the administrative proceedings on remand with the district court. *Id.* After the claimant moved for summary judgment, the district court remanded once again for the taking of new evidence. *Id.* at 106. A third ALJ hearing was held, after which a

decision fully favorable to the claimant was issued and later affirmed by the Appeals Council.

When the Secretary failed to file the administrative record or even the outcome of those proceedings with the court, the claimant filed a copy of the last ALJ decision, asked the court to enter final judgment, and moved for fees under the EAJA. The district court, noting that the fee petition was filed more than 30 days after both the district court's second remand order and the Appeals Council's final administrative decision, dismissed the fee petition as untimely. *Id.*

The court of appeals reversed for three reasons, only one of which is directly relevant here. The court found the application timely because an administrative decision cannot be a "final *judgment*" under the language of the EAJA, a view confirmed by the EAJA's clear distinction between final court *judgments* and final administrative *decisions*. *Guthrie*, 718 F.2d at 106 (*comparing* 5 U.S.C. § 504(a)(2) *with* 28 U.S.C. § 2412(d)(1)(B)). Indeed, the court noted the Secretary's view that "an administrative decision cannot constitute a 'final judgment' for the purposes of EAJA." *Guthrie*, 718 F.2d at 106. The court concluded, therefore, that a district court order, entered after completion of the administrative proceedings on remand, is the event that triggers the 30-day statute of limitations.[3]

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[3] The court also held that the district court's original remand order could not be a "final judgment" because remand orders in Social Security cases are interlocutory in nature. *Id.* Although this proposition still holds for Social Security

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Other pre-1985 authority also is consistent with *Guthrie*. In *Brown v. Sec'y of HHS*, 747 F.2d 878, 883-84 (3d Cir. 1984), the claimant asked for EAJA fees within 30 days after the district court had remanded the case for further administrative proceedings, but before any determination that he was disabled. The Third Circuit held that "the successful party generally should not recover attorney's fees [immediately after remand] . . . since the claimant's rights and liabilities and those of the government have not yet been determined." 747 F.2d at 883; *accord Sullivan v. Hudson*, 109 S.Ct. at 2248. The court then endorsed the approach *suggested by the Secretary* that, if a claimant receives benefits after remand, the Secretary *must* "return to the court for a final judgment." *Id.* at 884. Responding to the claimant's concern that only certain remand orders under 42 U.S.C. § 405(g) require the Secretary to furnish the administrative record to the remanding court, the court deferred to the "Secretary's representation" that he will "file a copy of the government's decision upon conclusion of *any* remand decision in which a claimant receives benefits." *Id.* (emphasis in original). The Third Circuit reasoned that the court would then be able "to enter[] the final judgment contemplated by the EAJA," *id.*

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remands for the taking of new or additional evidence Social Security remand orders that modify or reverse the decision of the Secretary on legal grounds are immediately appealable. *See Sullivan v. Finkelstein*, 110 S.Ct. 2658 (1990) (discussed in more detail at pp. 26-33 *infra*). The court also found support in 42 U.S.C. § 405(g), the jurisdictional provision governing Social Security actions, that requires the Secretary to file the administrative record with the district court to allow the court to enter a judgment with respect to certain administrative decisions.

at 884-85, and noted that, if the Secretary failed to ask for a final judgment, the court could require the Secretary to do so under its general equity powers. *Id.* at 885 (*citing Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)).

Finally, in *Taylor v. Heckler*, 778 F.2d 674 (11th Cir. 1985), the claimant won a remand from the district court, and filed his first EAJA petition within 30 days of that order. That petition was rejected as premature, *id.* at 675, presumably because the claimant had not yet proved his disability. After prevailing on remand, the claimant obtained a dismissal order from the district court and moved for EAJA fees within 30 days thereafter. *Id.* The district court denied this second application on the ground that such a dismissal order was not "a final judgment within the meaning of the EAJA." *Id.* The court of appeals reversed, concluding that the order of dismissal, rather than the initial remand order, was the final judgment that commenced the EAJA's 30-day filing period. *Id.* at 677-78. *Taylor* also stated that "a final judgment must have been entered *in the district court* before a litigant can apply for an attorney's fee under the EAJA." *Id.* at 677 (emphasis added).[4]

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[4] The *Taylor* court questioned whether all remand orders should be considered interlocutory, rather than final orders, but felt bound by circuit precedent that all such orders were interlocutory in nature for purposes of appeal under 28 U.S.C. § 1291. 778 F.2d at 677 & n.2. It appears to have been the Secretary's position in *Taylor*, *Brown*, and *Guthrie* that the remand decision, issued prior to any entitlement to benefits, was the "final judgment" for purposes of triggering the 30-day filing period. However, during the same general time period,

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Thus, prior to the 1985 amendments, the case law confirmed the clear meaning of the statutory language – that a "final *judgment*" under the EAJA can only be rendered by a court.

D. The 1985 Amendments, Their History, and Purpose Strongly Support Petitioner's Position.

As indicated above, the 1985 law made the EAJA permanent and enacted certain amendments, one of which is directly relevant here. Primarily because of judicial confusion over the word "final," Congress enacted a definition for the term "final judgment:"

> "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

28 U.S.C. § 2412(d)(2)(G). By its terms, there is nothing in this definition that alters the common understanding of the term "judgment" as it is used in 28 U.S.C. § 2412(d)(1)(B) and elsewhere in the EAJA, and as confirmed by all then-existing circuit precedent, to mean a court judgment and not an agency decision.

Moreover, Congress' inclusion of "an order of settlement" as a type of "final judgment" simply reinforces the

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the Secretary also argued that such remand orders cannot support an award of fees because the claimant had not yet prevailed in the litigation. *See, e.g., McGill v. Heckler*, 712 F.2d 28, 30 (2d Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); *see also Sullivan v. Hudson*, 109 S.Ct. at 2248 (established rule is that claimant is not prevailing party until he or she is found disabled).

previously unchallenged understanding that a "judgment" is an order rendered by a court. Orders of settlement are issued in the judicial context; clearly, they are not references to administrative determinations before the Social Security Administration. Under the doctrine of *ejusdem generis*, therefore, the Court should "restrict[] application of the general term ["judgment"] to things that are similar to those enumerated ["order of settlement"]," 2A *Sutherland Statutory Construction* § 47.17, p. 166 (Sands 4th ed. 1984), and conclude that all "judgments" under the EAJA, like settlement orders, must emanate from a federal court.

The Secretary, nevertheless, posits that the 1985 amendment wholly, but silently, changed the definition, and transformed some, but not all, Appeals Council decisions into "judgments" (Opp. at 8-9). The legislative purpose behind the 1985 amendment, however, had nothing to do with overturning the accepted definition of "judgment." At legislative hearings, numerous witnesses expressed concern that the judiciary was confused over whether a judgment was "final" after the period for appeal had ended (normally 60 days under Fed. R. App. P. 4), or when it was rendered, thus starting the 30-day clock immediately upon entry of the judgment. *See, e.g. Equal Access to Justice Act Amendments: Hearing on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 33-34 (1985) ("courts have been split . . . . Some have held that the fee application has to be filed within thirty days of the *District Court judgment*. . . . Clarifying the definition of 'final judgment' to mean when the government's right to appeal has lapsed,

will end the confusion . . . ") (emphasis added); *Equal Access to Justice Act Amendments: Hearing on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 24 (1984) (testimony of Carolyn Kuhl, Deputy Assistant Attorney General) ("It is unclear under the act, whether a final judgment occurs when the *court* enters an appealable order or when a party's right to appeal that order lapses") (emphasis added); *Reauthorization of Equal Access to Justice Act: Hearing on S. 919 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 75-76 (1984) (same).

Congress took this testimony to heart and enacted the position preferred by a majority of those testifying: that the court's judgment would not be final until the time for appeal had lapsed. The legislative history makes abundantly clear that (1) this amendment would not change the recognized definition of "judgment" and (2) "judgment" as used in subsection (d) means a court order:

> H.R. 2378 defines "final judgment" to mean a judgment which is not [appealable], including an order of settlement. The meaning of final judgment is important because fee petitions must be filed within thirty days of such judgment. [C]ourts had taken a variety of approaches to the question. Some rule[d] that a judgment was final *when the decision was docketed* and still others when the time to appeal had run. By adopting this last interpretation, this bill will give both courts and litigants clear guidance . . . .

H.R. Rep. No. 120, Pt. I, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 135 (emphasis added) (hereafter "House Report I"); *see also* H.R. Rep. No. 120, Pt. II, 99th Cong., 1st Sess. 6 n.26 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 156 n.26 (hereafter "House Report II") (making numerous additional references to district court and appellate court orders as "final judgments" for EAJA purposes).

Since Congress knew that Social Security matters comprised the bulk of the EAJA caseload, the Committee's continued references to judicial orders severely undercuts any interpretation that construes the Secretary's administrative decisions to be "final judgments" under 28 U.S.C. § 2412(d)(1)(B). *See* Administrative Office of the U.S. Courts, *Annual Report of the Director for the Twelve Month Period Ending June 30, 1984 – Report of Fees and Expenses Under The Equal Access to Justice Act of 1980* 92 (63% of all EAJA filings were in Social Security cases). Finally, as if to foreclose the decision ultimately reached below, the Committee expressly rejected it:

> the [court's] remand decision is not a "final judgment," nor is the agency decision after remand. Instead, the District Court should enter an order affirming, modifying, or reversing the final HHS decision, and this will usually be the final judgment that starts the 30 days running.

House Report I at 19 (*citing Guthrie*, 718 F.2d 104; *Brown*, 747 F.2d 878); *see also Bradley v. Sec'y of HHS*, 741 F.Supp. 1461, 1464 (D. Idaho 1990) ("Given the legislative history behind the 1985 EAJA amendments, it is difficult, if not impossible, for this Court to understand the position of the Ninth Circuit concerning the 1985 amendments").

Thus, there can be no doubt that the "clear meaning of the statute as revealed by its language, purpose, and history" requires reversal of the decision below. *Southeastern College v. Davis*, 442 U.S. 397, 411 (1979).

E. This Court's Decision in *Sullivan v. Hudson* Further Undermines the Secretary's Position Here.

Further support for petitioner's position is found in *Sullivan v. Hudson*, 109 S.Ct. 2248, where the Court held that, because proceedings on remand from the district court in Social Security actions are part of the EAJA's "civil action," the work performed by the claimant's representative on remand is compensable. *Id.* at 2253-57. In doing so, the Court expressly adopted the view that it is the district court judgment issued after the remand proceedings are complete, and *only* such a judgment, that constitutes the "final judgment" under 28 U.S.C. § 2412(d)(1)(B). 109 S.Ct. at 2255.

The Court first reviewed the highly integrated Social Security claims process, involving administrative and judicial review, remand, and, often, further judicial review. *Id.* at 2254. The Court noted its "past decisions interpreting other fee-shifting provisions [that] make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees," *id.* at 2255, fees for administrative work should be allowed. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). Following those cases, the Court

had little problem holding that, given the "close relation in law and fact" between the administrative and judicial proceedings, *Hudson*, 109 S.Ct. at 2256, fees are available under the EAJA for time spent on remand. To hold otherwise, would "ascribe to Congress an intent to throw the Social Security claimant a lifeline that it knew was a foot short." *Id.*

As a necessary predicate to its decision, the *Hudson* Court repudiated the Secretary's contention here. The Court noted that a remand, prior to the issuance of a decision actually making a finding of disability, does not ordinarily make the claimant a "prevailing party" for EAJA purposes. *Id.* at 2255. Thus, the Court stated:

> the EAJA provides that an application for fees must be filed with the court "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B) (1982 ed., Supp. V). As in this case, there will often be no judgment in a claimant's action for judicial review until the administrative proceedings on remand are complete. See *Guthrie v. Schweiker*, 718 F.2d 104, 106 (C.A.4, 1983) ("[T]he procedure set forth in 42 U.S.C. § 405(g) contemplates additional action both by the Secretary and a district court before a civil action is concluded following a remand"). The Secretary concedes that a remand order from a district court to the agency is not a final determination of the civil action and that the district court "retains jurisdiction to review any determination rendered on remand." Brief for Petitioner 16, 16-17.

Id.; *accord Myers v. Sullivan*, 916 F.2d 659, 679 n.20 (11th Cir. 1990) (decision below "would seem to be contrary to *Sullivan v. Hudson*"); *Gutierrez v. Sullivan*, 734 F.Supp. 969, 970-71 (D. Utah 1990) (expressly rejecting result below as

contrary to *Hudson*); *Lyden v. Howerton*, 731 F.2d 1545, 1551-53 (S.D. Fla. 1990) (relying on *Hudson* and Ninth Circuit's decision in *Papazian v. Bowen*, 856 F.2d at 1456); *see also Sullivan v. Finkelstein*, 110 S.Ct. at 2665 n.8.

It is thus clear that the concept of a "civil action" under the EAJA – from which the Court's holding in *Hudson* flows – begins with a complaint *and ends* with a court judgment. The decision below runs counter to the essential *ratio decidendi* of *Hudson* and must, therefore, be rejected.

F. The Court's Decision in *Sullivan v. Finkelstein*, Involving the Issue of Appealability Under 28 U.S.C. § 1291, Does Not Help Respondent.

The Secretary is also in error in attempting to engraft the principle announced last Term in *Sullivan v. Finkelstein*, 110 S.Ct. 2658, on the EAJA's definition of "final judgment." The narrow ruling in *Finkelstein* – that a district court order remanding a case under the fourth sentence of the Social Security Act's jurisdictional provision, 42 U.S.C. § 405(g), is a "final decision" for purposes of appeal under 28 U.S.C. § 1291 – does not speak to, let alone up-end, the deeply embedded understanding, repeatedly endorsed by the Secretary himself, that a "final judgment" under the EAJA must be issued by a court. To the contrary, the actual ruling in *Finkelstein* is fully consistent with petitioner's position because the "judgment" held appealable there was one issued by the district court, not the agency. 110 S.Ct. at 2263-64.

In *Finkelstein*, the claimant was a widow whom the Secretary had found not disabled under a regulation that

requires individuals seeking survivors' benefits to have a so-called "listed impairment" as defined by the Secretary. *See* 20 C.F.R. Part 404, Subpart P, Appendix I (listing of specific medical conditions entitling an applicant to a finding of disability without further inquiry). The enabling legislation, however, requires a finding of disability if the claimant is precluded "from engaging in any gainful activity." 42 U.S.C. § 423(d)(2)(B). The district court agreed with the Secretary that the claimant did not have a listed impairment, but nevertheless remanded the case for further findings as to her ability to engage in gainful activity, thus "essentially invalidat[ing], as inconsistent with the Social Security Act, the Secretary's regulation restricting" survivors' benefits to those with a listed impairment. *Finkelstein*, 110 S.Ct. at 2663. Rather than accepting the remand, the Secretary sought an immediate appeal of this important issue of law, but the Third Circuit dismissed the appeal on the ground that the remand order was an interlocutory, non-appealable order under 28 U.S.C. § 1291.

The two most prominent features of the *Finkelstein* decision are its confined scope and its practical approach to the problem of obtaining appellate review of the particular type of district court order at issue there. Thus, the opinion begins by cautioning that it only addresses whether certain § 405(g) remand orders, not all remand orders, or even other orders under § 405(g), are appealable. *Finkelstein*, 110 S.Ct. 2662-63 & n.3 Moreover, the Court recognized that, if the Secretary issued a decision favorable to the claimant on remand, there would be no way for the Secretary to appeal the important adverse ruling of law included in the district court's decision. *Id.*

at 2664 ("there would be grave doubt . . . whether he could appeal his own order").

Textual support for the decision in *Finkelstein* came from the fourth sentence of § 405(g), which provides that the district court, in reviewing final administrative decisions of the Secretary, may enter a "judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The use of the term "judgment," when coupled with the eighth sentence's declaration that such judgments "of the court shall be final," convinced the Court that all "sentence-four" judgments, including those ordering a remand, are appealable under § 1291. *Finkelstein*, 110 S.Ct. at 2663-64.

The Court contrasted this scenario with the one envisioned by Congress in sentences six and seven of § 405(g). Sentence six allows the court to remand the case in two instances: (1) when the Secretary moves the court for remand prior to filing his answer to the claimant's complaint; and (2) when, at any time, the court finds that there is new evidence that is material and there exists good cause for not having considered that evidence previously. The second clause of sentence six further provides that, after the case is remanded, the Secretary shall take additional evidence, affirm or modify his previous findings of fact and decision, and file with the court all additional findings, his new decision, "and a transcript of the additional record and testimony upon which his action in modifying or affirming was based." 42 U.S.C. § 405(g). The seventh sentence provides for post-remand district court review of cases remanded under sentence six. *Finkelstein*, 110 S.Ct. at 2664. Thus, the "sixth sentence

of § 405(g) plainly describes an entirely different type of remand" from that allowed by sentence four, *id.*, which is appealable, by *either* party, at the earliest, after the Secretary has complied with his responsibilities under the second clause of sentence six and the district court engages in the review contemplated by sentence seven. *Id.* at 2664-65.

The Secretary attempts to bootstrap *Finkelstein*'s holding concerning sentence four of § 405(g) into a wholesale attack on EAJA jurisdiction (Opp. 12). Because there is nothing in sentence four "that requires the district court to do anything further after the remand to the Secretary" (*id.*), the argument goes, the Appeals Council's decision must, by default, be the final "judgment" under the EAJA. As we have explained, this reading of the term "judgment" flies in the face of the plain meaning of the EAJA, its legislative history and purposes, and this Court's recent pronouncement in *Sullivan v. Hudson*. Indeed, in *Finkelstein*, where the Secretary argued, and proved victorious on his claim that sentence-four remand orders are appealable, he also conceded that petitioner's reading of the EAJA's "final judgment" provision was correct, and, in fact, required by *Hudson*:

> we agree that it is appropriate for the Secretary to notify the district court of a decision in the claimant's favor on remand so that EAJA fees may be awarded . . . . All but one of the cases cited by respondent [*e.g.*, *Brown*, *supra*, 747 F.2d at 884] . . . refer to the Secretary's filing with the court any decision on remand that is favorable to the claimant . . . [to] *provide[] a realistic mechanism for the award of attorney's fees at that point.*

* * *

> [The Secretary only has to file his amended findings and record after sentence six remands]. Of course, where the court has remanded the cause to the Secretary for a rehearing because it has found the Secretary's first decision denying benefits to have been unlawful, it is appropriate for the Secretary to file *any* new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA. See *Sullivan v. Hudson*, 109 S.Ct. at 2255.

Reply Brief for Secretary at 11 & n.8, 44 & n.35, *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (No. 89-504) (emphasis added); *accord id.* at 25-26 & n.19; Secretary's Petition for Writ of Certiorari at 16 n.9, *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (No. 89-504); Reply Brief for the Secretary at 17, *Sullivan v. Hudson*, 109 S.Ct. 2248 (No. 88-616) ("it of course is appropriate for the Secretary to file that decision [after remand] with the district court" so that EAJA fees can be awarded). Thus, as the Secretary recognized, there simply is no reason, nor a basis in the language chosen by Congress when it drafted the EAJA, to apply appealability principles to this case.

The *Finkelstein* opinion took great pains to emphasize both that it did not involve the EAJA and that the district court's retention of jurisdiction to enter a "final judgment" *for EAJA purposes*, as described in *Hudson*, had not been altered. *Finkelstein*, 110 S.Ct. at 2666. Thus, the Secretary is plainly wrong in contending that an Appeals Council decision constitutes a "final judgment" after a sentence-four remand because there is nothing further required of the district court. While that is arguably true on the merits of a Social Security claim under § 405(g), it

is obvious that the district court has jurisdiction *under the EAJA* to entertain the attorney's fees motion itself, which is exactly what the district court did, and was required by the EAJA to do, in this case (JA 22). *See Hudson*, 109 S.Ct. at 2255 ("the remanding court continues to retain jurisdiction over the action within the meaning of the EAJA"); *see also* Reply Brief for the Secretary at 26 n.19, *Finkelstein v. Sullivan*, 110 S.Ct. 2658 (No. 89-504) (referring to district court's "inherent" retention of jurisdiction to award attorney's fees, after a sentence-four remand, *citing Hudson*, 109 S.Ct. at 2254-55).

The impossibility of rationally applying *Finkelstein* to the EAJA is made clear by the facts of this case. After petitioner filed his complaint (JA 3-5), he moved for summary judgment. While that motion was pending, the Secretary moved for "a voluntary remand for further administrative proceedings in this case" (JA 6). The purpose of this request was, in the Secretary's words, to bring "new evidence and information to the attention of the Appeals Council." *See* Defendant's Opposition to Plaintiff's Motion for Attorney Fees at 2 (C.D. Cal. filed July 10, 1986). In particular, the Secretary wanted to review new medical evidence that had come to light in conjunction with petitioner's second application for SSI benefits, some of which petitioner had attached to his motion for summary judgment. *Id.* The Secretary did not concede legal error of any kind. After petitioner consented (JA 9-10), the district court remanded the case (JA 11), and the Appeals Council made a finding of disability based on the new evidence (JA 14-16).

It is clear that this was a sentence-six remand. The district court, in effect, "order[ed] additional evidence to

be taken before the Secretary." 42 U.S.C. § 405(g) (sentence six). By contrast, the remand order did not "enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary . . . ." *Id.* (sentence four). Indeed, nothing was affirmed, modified, or reversed; rather, the parties agreed, with the court's approval, to have the Secretary look at new evidence bearing on the application.

The lesson here is that petitioner's EAJA application was timely regardless of what type of remand order was issued by the district court. Given the 1985 legislative history, it is inconceivable that Congress wanted the courts to engage in hair-splitting over whether a case was remanded under sentence four or sentence six, a fact which has no relevance whatsoever to a claimant's entitlement to fees under the EAJA. House Report II at 6 n.26 (warning twice against "overly technical" interpretation of 30-day period, because "[t]his section should not be a trap for the unwary resulting in the unwarranted denial of fees"). Such hair-splitting, however, would be the order of the day under the regime advocated by the Secretary. In some instances, it will be unclear, especially on the face of the remand order, whether a case has been remanded under sentence four or sentence six. *See Hudson*, 109 S.Ct. at 2252; *Myers*, 916 F.2d at 677 n.18 (illustrating difficulty of distinguishing between fourth-sentence and sixth-sentence orders); *cf. Finkelstein*, 110 S.Ct. at 2665 n.8 ("it is far from clear that *Guthrie* did not involve a sixth-sentence remand"). Courts will also be faced with the question whether the administrative decision, or the judgment of the court, supplies the relevant trigger date

in cases involving both a fourth-sentence and sixth-sentence remand, as would be the situation where the court remanded because there was good cause for the taking of new evidence and the ALJ had erred as a matter of law in failing to take testimony from a vocational expert. *Myers*, 916 F.2d at 677 n.18, 678 n.19 (noting that three of four cases before court involved hybrid fourth-sentence/sixth-sentence remand orders); *compare Hudson*, 109 S.Ct. at 2252.[5]

For all these reasons, *Finkelstein* does not speak to the EAJA, as the Court itself noted. 110 S.Ct. at 2665 n.8, 2666.

G. Adoption of the Decision Below Will Render Administration of the EAJA Unworkable, Especially in Social Security Cases.

As we have shown, Congress intended that the time in which EAJA applications must be filed runs from the issuance of a "final judgment" by a federal court. The following additional reasons demonstrate why Congress could not have countenanced the Ninth Circuit's ruling,

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[5] We acknowledge that the Sixth Circuit has very recently held an Appeals Council decision after remand to be a "final judgment" for EAJA purposes because the case had been remanded under sentence four, indicating that a different result would obtain in a sixth-sentence case. *Buck v. Sec'y of HHS*, No. 89-4130, slip. op. at 13 (6th Cir. January 18, 1991), 1991 U.S.App. LEXIS 787; *see also Jabaay v. Sullivan*, 920 F.2d 472, 474-75 (7th Cir. 1990) (recognizing Secretary's duty to file with court administrative record after remand, and court's duty to review that record, but nevertheless holding that agency decision is "final judgment" for EAJA purposes).

and why adherence to the decision below would render administration of the EAJA utterly unworkable, especially in Social Security matters, which comprise the vast majority of EAJA cases.[6]

First, the Ninth Circuit's ruling will create havoc in the filing of dual applications for attorney's fees under the EAJA and under § 206(b) of the Social Security Act, 42 U.S.C. § 406(b). Social Security benefits fall into two broad classifications. The first, issued under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.* ("Title II benefits"), includes payments to retired and disabled workers, and certain of their relatives and survivors, based on the earnings and contributions of a retired, disabled, or deceased worker. The second, SSI, is a public welfare program, paid from general government revenues, to disabled or retirement-age individuals living in poverty. *See* Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.*[7]

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[6] In fiscal year 1990, 93% of all EAJA applications filed were against the Secretary, nearly all of which were in Social Security disability cases. Administrative Office of the U.S. Courts, *1990 Annual Report of the Director – Report of Fees and Expenses Awarded Under the Equal Access to Justice Act* I-24 & Table 20. In fiscal year 1989, 1,858 claimants won their Social Security cases by outright district court reversal, while 5,117 prevailed after remand, indicating that the typical EAJA application arises in a court-remanded case such as this one. Social Security Administration, *Annual Report to the Congress* 29 (April 1990).

[7] Many SSI recipients have some work history and, therefore, also receive some Title II benefits, thus the term "*supplemental* security income," or SSI. As of December 1988, 47.8% of

(Continued on following page)

Under 42 U.S.C. § 406(b), "*[w]henever a court renders a judgment*" favorable to a Title II claimant, "the court may determine and allow *as part of its judgment*" an attorney's fee in an amount not exceeding 25% of the claimant's past-due benefits, to be paid out of the "past-due benefits to which the claimant is entitled by reason of such judgment." *Id.* § 406(b)(1) (emphasis added). In practice, after it is clear that the claimant has prevailed, the claimant's attorney will generally apply for a fee under both the EAJA and § 406(b), but only after, or in conjunction with, a request for the entry of final judgment. Congress recognized that joint EAJA/§ 406(b) applications were the norm, and so in the 1985 amendments it required an offset of § 406(b) fees against the fees awarded under EAJA, to allow claimants to keep as much of their past-due benefits as possible. Pub.L. No. 99-80, § 3, 99 Stat. 186 (28 U.S.C. § 2412 note); House Report I at 20 (purpose is to preclude "double dipping" by attorneys and to make sure claimant is not deprived of needed benefits). Thus, if the claimant has a colorable EAJA claim, the attorney is ethically obligated to seek such a fee, so as to maximize the claimant's economic well-being.

(Continued from previous page)

all SSI beneficiaries received at least some Title II benefits. Social Security Administration, *Social Security Bulletin, Annual Statistical Supplement* 333, Table 9.D2 (1989). Of the over 7700 disability cases filed in district court during fiscal year 1989, about half were pure Title II claims, 1300 were pure SSI claims, and the remaining 2,600 were concurrent claims. Social Security Administration, *Annual Report to the Congress* 29 (April 1990).

Adoption of the decision below will throw this system into chaos. Within 30 days of the issuance of a "favorable" administrative decision on remand, the claimant's attorney will have to seek a fee under EAJA. Yet he or she will be unable to be awarded a fee under § 406(b) because there does not exist a judgment upon which to do so, the very judgment that the Secretary now claims may not even be issued at all, at least in "sentence-four" cases, under *Finkelstein*. Of course, the court *should* issue such a judgment for § 406(b) purposes, which would be precisely the same judgment that petitioner urges commences the 30-day statute of limitations for the filing of an EAJA petition. Thus, there is absolutely no reason to insist that the EAJA applicant file a fee petition immediately after the administrative decision, when the district court, in most cases, will also be considering a § 406(b) application, at which time the court can enter a judgment and, if necessary, perform the EAJA/§ 406(b) offset that the law requires.[8]

The practical impact on the claimant of the decision below is vividly demonstrated by *Watson v. Sullivan*, 735 F.Supp. 971 (D. Ore. 1990), in which the court followed the ruling below, and held untimely an EAJA application

[8] Moreover, it takes about 60 days for the Secretary to calculate the claimant's past-due benefits after a favorable decision (*see* App. 1a), which, therefore, is the first point that the district court can calculate the amount of fees allowable under § 406(b); if the claimant is required to file for EAJA fees within 30 days of the administrative decision on remand it will be impossible for the claimant to request, or for the court to award, a specific amount under § 406(b). *See generally Smith v. Bowen*, 815 F.2d 1152 (7th Cir. 1987).

filed 60 days after the claimant's attorney had received the ALJ's decision on remand. *Id.* at 972-73. The court declined to enter a final judgment for EAJA purposes, holding that the administrative decision already amounted to one, but nevertheless awarded in excess of $7000 under § 406(b), all of which was deducted from the claimant's past-due benefits. Thus, the court was willing to enter judgment for § 406(b) purposes, as the law requires, but was unable to do so for EAJA purposes. The real loser, of course, was the claimant, who may well have avoided a $7000 loss if the court had entertained the EAJA application.[9]

A much more sensible result was reached in *Bradley v. Sec'y of HHS*, 741 F.Supp. 1461 (D. Idaho 1990), where the Secretary argued that the decision below was controlling and that the court should deny EAJA fees because the application had not been filed within 30 days of the administrative decision on remand. *Id.* at 1463. At the same time, however, the Secretary also asserted that a fee under the Social Security Act could not be awarded because "there must first be final judgment ordered by the court in order to properly file for attorneys fee approval under § 406(b)." *Id.* at 1465. After expressing grave doubt about the Ninth Circuit's interpretation of the EAJA and the 1985 legislative history, *id.* at 1464, the

[9] In fiscal year 1990, just over 90% of all EAJA applications were granted. Administrative Office of the U.S. Courts, *1990 Annual Report of the Director – Report of Fees and Expenses Awarded Under the Equal Access to Justice Act* I-24, Table 20. Thus, it is very likely that the claimant in *Watson* would have been made whole, if not for the constraints imposed by the decision below.

court distinguished the decision below on the ground that the Appeals Council decision there was fully claimant-favorable, a reason given by the Ninth Circuit for not requiring the Secretary to file his new decision with the district court under § 405(g) (JA 32); in *Bradley*, however, the decision was not fully claimant-favorable because the Appeals Council finding of disability did not reach back as far as the claimant had urged. 741 F.Supp. at 463. The court, therefore, entered a final judgment and awarded fees under both statutes.

Second, the Ninth Circuit's decision assures that most EAJA petitions will have to be filed before all of the work on the case is completed. In almost every court-remanded case, work will be performed to insure that the past-due benefits are properly calculated and that the continuing monthly payment is for the correct amount. Especially in the needs-based SSI program, this process is extraordinarily complex. *See* 20 C.F.R. §§ 416.1100-1266; *see also* 20 C.F.R. §§ 404.401-468, 404.1360-1414 (set-offs and deductions under Title II). Since this work is "necessary . . . to the ultimate vindication of the claimant's rights," it is compensable under the EAJA. *Hudson*, 109 S.Ct. at 2257. If the ruling below is affirmed, however, the EAJA applicant either will generally have to forego fees for work properly compensable under *Hudson* or proceed in a piecemeal fashion by amending the original fee application, assuming that such an amendment would be timely.

Third, the Ninth Circuit failed to recognize that the Secretary's administrative review process is a highly informal one, in which it is often difficult, if not impossible, to flag the finality of a decision for EAJA purposes. ALJ decisions frequently are revised *sua sponte*, or

because the claimant's representative has noticed a technical, even typographical, error in them. *See, e.g.*, Secretary's Brief at 5 n.2 & App. 1a-2a, *Sullivan v. Hudson*, 109 S.Ct. 2248 (No. 88-616). The Secretary may argue in such a case that the first decision triggers the 30-day period, and litigation would then ensue as to whether the second, corrected decision is sufficiently "substantive" to establish a new 30-day filing period.

Moreover, in the Secretary's massive, impersonal review system, notices of decision frequently are sent to the claimant only, not to the claimant's representative. *See* Petition for Rehearing *En Banc* by Appellant, Exhibits "A"-"C" (9th Cir. filed July 14, 1989) (affidavits from three attorneys testifying that they frequently do not receive copies of Secretary's administrative decisions). For this reason, among others, the Secretary has established liberal rules for waiving his own intra-agency deadlines, *see, e.g.*, 20 C.F.R. §§ 404.911(a),(b)(7), 404.933(c), 404.982, but he has no such rule for EAJA petitions, and could not, in any event, alter the 30-day EAJA filing deadline established by Congress.

Fourth, the Ninth Circuit's question-begging conclusion that its ruling applies only to fully claimant-favorable decisions (J.A. 32) misses the mark, because, in a system in which further review is possible, it is surely the *claimant*, not the Secretary, who decides whether a decision is fully favorable. *See* Secretary's Brief at App. 1a-2a, *Sullivan v. Hudson*, 109 S.Ct. 2248 (No. 88-616) (claimant's disability onset date was incorrect by full year until error was brought to Secretary's attention); *Bradley*, 741 F.Supp. at 1463. Indeed, the Secretary's own mailing sent to all

claimants whom he believes have received *favorable* decisions states that the claimant may nevertheless (1) file exceptions with the Appeals Council "if you disagree with this decision," or (2) "pursue your civil action with the court." Form HA-L96-U7(5-90) (*infra*, App. 1a-2a).

Fifth, adoption of the Ninth Circuit's approach will invite other government agencies to erect similar barriers to the consideration of EAJA applications based on the purported peculiarities of their own administrative review mechanisms. It will not be long before the INS or the NLRB, for instance, is arguing that some of its administrative decisions on remand, are, under certain conditions known in advance only to the agency, "final judgments" under the EAJA. 28 U.S.C. § 2412(d)(1)(B); *see Lyden*, 731 F.Supp. at 1551-53. Plainly, this is not what Congress had in mind. *See* House Report II at 6 & n.26.

For all of these reasons, the decision of the Ninth Circuit should be reversed.

II. THE NINTH CIRCUIT'S RULING SHOULD NOT BE APPLIED IN THIS CASE.

If this Court upholds the ruling below, it should not be applied retroactively. Under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), a court may give prospective effect only to decisions that establish new rules of law or overrule clear past precedent, where retroactive application would be inequitable to the party before the court and others similarly situated.

Before turning to the *Chevron Oil* inquiry, however, we must address the threshold consideration of whether

the 30-day filing period is a jurisdictional bar which precludes the Court from engaging in retroactivity analysis. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981) (jurisdictional nature of final order rule of 28 U.S.C. § 1291 prevents retroactivity analysis). The court below, following circuit precedent, stated that the 30-day filing period is "jurisdictional" (JA 29-30) and, thus, not subject to tolling or other equitable doctrines excusing strict compliance under certain circumstances. *But see James v. Dep't of HUD*, 783 F.2d 997, 999 (11th Cir. 1986) ("The thirty-day time limit for filing a fee application should serve as a statute of limitations, not as a trap for the unwary"). It is now clear, however, that the EAJA's filing period is in the nature of a statute of limitations, and not jurisdictional.

In *Irwin v. Veterans Administration*, 111 S.Ct. 453 (1990), the Court held that 42 U.S.C. § 2000e-16(c), which allows an employee aggrieved by a final action of the Equal Employment Opportunity Commission 30 days to file a Title VII action in federal court, is not jurisdictional, but rather is a statute of limitations subject to equitable tolling, as well as other equitable principles. 111 S.Ct. at 456-57 (waiver and estoppel also apply); *see also Bowen v. City of New York*, 457 U.S. 467, 479 (1986). The Court held, as a general matter, that once Congress has waived the government's sovereign immunity, equitable principles apply to the same extent as in a suit among private parties, and that, therefore, statutes of limitations in actions against the government are not jurisdictional. *Id.* at 457. Accordingly, because the EAJA is a waiver of the federal government's immunity to fees and litigation

expenses, its 30-day filing period is not jurisdictional, and ordinary retroactivity principles control.

Turning to the proceedings below and the relevant legal landscape, retroactive application of a rule allowing Appeals Council decisions to trigger the EAJA's limitations period "would be anomalous indeed." *Chevron Oil*, 404 U.S. at 107. When petitioner filed the complaint in June 1984 (JA 5), the law required the Secretary to return to the district court for entry of a final judgment upon which an EAJA award could be made. *Guthrie*, 718 F.2d at 106 (expressly rejecting position that 30-day period may commence with issuance of an administrative decision). Shortly thereafter, the Third Circuit issued its decision in *Brown, supra*, which followed *Guthrie*, 747 F.2d at 884-85, and relied on the Secretary's promise that he would, as a matter of policy, "return to the district court and file a copy of the government's decision upon conclusion of *any* remand proceeding in which a claimant receives benefits." *Id.* at 884 (emphasis in original). *Brown* also noted that the EAJA "requires that a successful claimant apply for a fee award within thirty days of the final judgment of the *district court*." *Id.* (emphasis added).

Thereafter, Congress addressed the issue of finality in the 1985 amendments, making clear that a settlement, like any other indicator of judicial finality, must be made the subject of a court order before the 30-day period begins to run. 28 U.S.C. § 2412(d)(2)(G). The 1985 legislative history adopted *Guthrie*, and stated that the district court's judgment following the "agency decision after remand," and not the agency decision itself, is the "final judgment" for EAJA purposes. House Report I at 20. After the 1985 amendments, as would be expected, the courts continued

to follow *Guthrie* and *Brown*, explicitly or implicitly, with near unanimity. *See, e.g., Seymore v. Sec'y of HHS*, 738 F.Supp. 235, 239 (N.D. Ohio 1990); *Lenz v. Sec'y of HHS*, 641 F.Supp. 144, 145 (D.N.H. 1986); *Fleming v. Bowen*, 637 F.Supp. 726, 729 (D.D.C. 1986); *Miles v. Bowen*, 632 F.Supp. 282, 283 (M.D. Ala. 1986). *But see Wagaman v. Bowen*, 698 F.Supp. 187, 189-90 (D.S.D. 1988).[10]

On May 7, 1985, after a court remand in this case, the Appeals Council issued a decision finding petitioner disabled (JA 14-16). On June 10, 1985, the U.S. Attorney handling petitioner's case received a form from the Secretary stating that, after court remand, "[t]he Appeals Council has issued a decision favorable to the plaintiff. If appropriate, *have the action discontinued or dismissed*" (JA 17-18) (emphasis added). The U.S. Attorney never complied with that directive, and so, on May 18, 1986, petitioner filed an application for attorney's fees. The Secretary opposed this application on the merits, and, on February 18, 1987, the district court entered an order denying the request for fees (JA 22). Neither the Secretary nor the district court raised the issue of timeliness.

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[10] *Wagaman*, the lone decision prior to the Ninth Circuit's ruling that allowed an Appeals Council decision to be a "final judgment" under the EAJA, was issued subsequent to the events giving rise to this dispute, and so has no bearing on the retroactivity issue. *See American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323, 2335 (1990) (plurality opinion). Moreover, *Wagaman* relied on two Eighth Circuit decisions for the proposition that an Appeals Council decision after remand is a final judgment for EAJA purposes, neither of which stand for that proposition. *Wagaman*, 698 F.Supp. at 189 (*citing Gamber v. Bowen*, 823 F.2d 242 (8th Cir. 1987); *Cook v. Heckler*, 751 F.2d 240 (8th Cir. 1984)).

Petitioner appealed, and the parties fully briefed the issues on the merits. The Secretary did not argue on appeal that the Appeals Council's decision could trigger the 30-day limitations period. Despite the Secretary's admitted waiver of this issue (*see* Brief for Appellee at 7 n.3 (9th Cir. filed June 16, 1987)), on July 30, 1987, the Ninth Circuit raised the matter in a *sua sponte* order demanding that petitioner show cause why the case should not be dismissed for lack of jurisdiction (JA 23). Given the fact that the 30-day filing period is not jurisdictional, but is a statute of limitations subject to waiver, the Secretary's failure to raise the issue below is sufficient ground to constitute a waiver in this case.

At no point did the legal terrain portend the decision below. Indeed, in 1989, the requirement that the Secretary obtain a final judgment after remand, at least for EAJA purposes, gained explicit approval from this Court. *Hudson*, 109 S.Ct. at 2254-55 (approving *Taylor*, *Brown*, and *Guthrie*). The Secretary's position also remained constant, recognizing that the law required him, "at least for purposes of awarding attorney's fees" under the EAJA, to return to the district court, and that only a court judgment can trigger the 30-day filing period. Secretary's Reply Brief at 12, *Sullivan v Hudson*, 109 S.Ct. 2248 (No. 88-616). Even in *Finkelstein* – the ruling now claimed to require affirmance here – the Secretary remained true to his prior position:

> Of course, it is appropriate for the Secretary to file *any* new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA.

Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (No. 89-504) (emphasis added).

Moreover, elsewhere the Secretary has taken the position that a Social Security claimant has the absolute right to return to the district court on the merits – whether or not the Secretary believes that the claimant has won on remand – and, therefore, presumably, for attorney's fees as well. 54 Fed. Reg. 37,789, 37,791 (1989) (in promulgating regulations concerning intra-agency review of ALJ decisions on remand, Secretary states that failure to file exceptions to ALJ's decision on remand does not bar return to court; claimant need not file new civil action after issuance of unfavorable ALJ decision). Furthermore, on the forms *currently* used by the Secretary to inform claimants of both favorable and unfavorable ALJ decisions on remand, claimants are informed that they have the absolute right to return to the district court and that "we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court" (*infra*, App. 1a-4a). *Accord* Administrative Office of the U.S. Courts, *1989 Annual Report of the Director – Report of Fees and Expenses Awarded Under The Equal Access to Justice Act* 98 (report required by 28 U.S.C. § 2412(d)(5)).

With this background in mind, we turn to the first of three factors under *Chevron Oil* – whether the decision below established a new principle of law, either because it overruled clear past precedent or because it decided an issue of first impression the resolution of which was not clearly foreshadowed. 404 U.S. at 107. In applying this factor, we look to the law at the time that the underlying conduct, or the failure to act, took place. *Id.* at 106-09

(refusing to apply retroactively decision altering applicable statute of limitations, and looking to law in effect when new limitations period would have expired); *see also American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323, 2336 (1990) (plurality opinion); *id.* at 2353-55 (dissenting opinion of Stevens, J.) (recognizing continued vitality of *Chevron Oil* in statute of limitations context).

There can be no question that, at the time the relevant event took place – when petitioner failed to divine the need to file his fee petition within 30 days of the administrative decision on remand in June 1985 – the law unequivocally required the Secretary to return to the district court after remand to report the results of the proceeding, and thereby either continue or dismiss the pending civil action. Under the EAJA, it was equally clear that a final judgment from the district court after remand was necessary to trigger the 30-day limitations period, as the Secretary expressly told this Court just last Term in *Finkelstein*, and as the Court itself had indicated in *Hudson*. 109 S.Ct. at 2254-55; *see also Myers*, 916 F.2d at 679 n.20 (noting that decision below "would seem to be contrary to *Sullivan v. Hudson*"). Thus, the Ninth Circuit's decision established a new principle of law, "by overruling clear past precedent on which litigants may have relied." *Chevron Oil*, 404 U.S. at 106.

Next, given the prior history of the 30-day rule and its purpose and effect, retroactive application of a new rule would plainly retard the purposes of the law. *Id.* at 106-07. Indeed, retroactive application of the Ninth Circuit's decision would be inconsistent with the basic purposes of the EAJA which are to increase court access for

individuals and to improve government policies. *Commissioner v. Jean*, 110 S.Ct. at 2322 n.14. Moreover, retroactive application would be the very "trap for the unwary resulting in the unwarranted denial of fees" that Congress sought to eliminate in the 1985 amendments. House Report II at 6 n.26.[11]

Finally, retroactive application would produce substantially inequitable results, *Chevron Oil*, 404 U.S. at 107, as the facts of this case illustrate. Petitioner's counsel, a solo practitioner, took this case on a contingent basis, recognizing that the EAJA would be the only basis for a full fee under the SSI program. *See* 42 U.S.C. § 406(b) (withholding past-due benefits allowed in Title II cases only); *Bowen v. Galbreath*, 485 U.S. 74, 77 (1988) (district court has no authority to withhold attorney's fees from retroactive SSI awards, noting "extreme financial need of SSI beneficiaries"). After toiling for several years on his client's behalf, and after the Secretary failed to file the administrative decision with the court, counsel moved for EAJA fees at a point considered timely under a nationwide practice so settled that neither the Secretary nor the court raised the issue in the district court. To deny petitioner now an opportunity for a fee "would surely be

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[11] Of the 412 EAJA applications filed in fiscal year 1990, only four were denied on timeliness grounds. Administrative Office of the U.S. Courts, *1990 Annual Report of the Director – Report of Fees and Expenses Awarded Under the Equal Access to Justice Act* I-24, Table 20, I-27. The decision below, however, has interjected a great deal of confusion, which, in itself, has resulted in more than four *reported* decisions on the issue of timeliness under 28 U.S.C. § 2412(d)(1)(B). *See Myers*, 916 F.2d at 661 n.2 & 678 n.19.

inimical to the beneficent purpose of the Congress." *Chevron Oil*, 404 U.S. at 108.

Moreover, retroactive application also would be unjust to the numerous other claimants and their representatives who would otherwise suffer from an affirmance here. Attorneys with pending EAJA petitions, or for whom 30 days has run from a claimant-favorable administrative decision on remand, relied on settled law and should not be penalized now by the Secretary's abrupt turnabout occasioned solely by the Ninth Circuit's *sua sponte* order. More fundamentally, Title II claimants will be damaged severely because, although their attorneys will still get a fee from *their* past-due benefits under 42 U.S.C. § 406(b), an affirmance here will, if applied retroactively, negate any possibility of an EAJA fee, thus creating the potential that claimants will suffer substantial losses of needed disability benefits. *See Watson*, 735 F.Supp. 971 (potential loss of more than $7,000 in past-due benefits by retroactive application of *Melkonyan*); *Beckstead v. Sullivan*, No. 89-15715 (9th Cir. November 2, 1990) (unpublished), 1990 U.S.App. LEXIS 21246 (retroactivity of *Melkonyan* raised, but case decided on other grounds). *But cf. Myers*, 916 F.2d at 677-78 (holding that *Finkelstein* should not apply retroactively to EAJA timeliness questions).

Thus, if the Ninth Circuit's ruling is upheld, this Court should give that ruling prospective effect only because, as in *Chevron Oil*, the "equities require[] non-retroactive application of the . . . statute of limitations here." 404 U.S. at 109. In addition to those equities, the EAJA's plain language, history and purposes demand

that the 30-day limitations period commence in the courthouse, not at the agency.

CONCLUSION

For the reasons stated above, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

NOTICE OF FAVORABLE DECISION-TITLE II, TITLE XVI AND TITLE XVIII
(Use in Court-Remanded Cases Only)

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

NOTE TO PROCESSING CENTER:

FURTHER ACTION NECESSARY

Name and Address of Claimant:

•

SSN:

Date mailed:

Name and Address of Representative:

•

NOTICE OF ADMINISTRATIVE LAW JUDGE DECISION — PLEASE READ CAREFULLY

Enclosed is the Administrative Law Judge's decision on your claim. This notice gives you information about what you can do if you disagree with the decision. Please read this notice and the decision carefully.

This Decision Is Favorable To You

- Another office of the Social Security Administration will process the decision and will send you a notice about your benefits. Your local Social Security office or another Social Security office may ask you for more information before you receive the notice about your benefits. If this happens, please answer promptly.
- You should hear something about this decision within 60 days. If you do not, contact your local Social Security office.

If You Disagree With This Decision

If you disagree with the Administrative Law Judge's decision, you may appeal to the Appeals Council. You must do this by filing written exceptions. Exceptions are your statements explaining why you disagree with the decision of the Administrative Law Judge.

- Mail the written statement of your exceptions to the Appeals Council, Office of Hearings and Appeals, P.O. Box 3200, Arlington, VA 22203.
- You must file your written exceptions **within 30 days** from the date you receive this notice. The Appeals Council assumes that you receive this notice within five days after the date at the top of this notice unless you show that you did not receive it within the five-day period.

CLAIMS FOLDER

Form HA-L98-U7 (5-90) *Destroy Prior Editions*

- If you need more time to file your written exceptions, you must file a written request for additional time with the Appeals Council within 30 days of the date you receive this notice. If you request more than a 30-day extension of time, you must explain why you need the extra time.

- Please **include the Social Security number(s)** shown on the decision on any paper you send to the Appeals Council.

- The Appeals Council will consider your exceptions and the parts of the decision you think are wrong. The Appeals Council may also consider those parts which you think are correct.

- If the Appeals Council concludes that further action is necessary, it will either return your case to an Administrative Law Judge for further action or issue a decision.

- If the Appeals Council issues a decision, its decision may be either more or less favorable to you than the decision of the Administrative Law Judge.

- If the Appeals Council concludes that the decision of the Administrative Law Judge is correct, it will notify you in writing why your exceptions do not warrant a change in the decision of the Administrative Law Judge.

- If you submit written exceptions and the Appeals Council does not change the decision of the Administrative Law Judge, that decision becomes the final decision of the Secretary after remand.

- Any future claim you may file will not change a final decision on this claim if the facts and issues are the same.

You Do Not File Written Exceptions

Even if you do not file exceptions, the Appeals Council may review your case on its own motion (within 60 days from the date this notice was mailed). The Appeals Council will notify you if it decides to do so and will advise you what action it proposes to take.

If the Appeals Council does not review your case on its own motion and you do not file exceptions, we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court. You have the right to pursue your civil action with the court.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as filing exceptions to this decision. You might lose benefits if you file a new application instead of filing written exceptions to this decision. Therefore, if you think this decision is wrong, you should file your exceptions within 30 days.

If you have any questions, please contact your local Social Security office. If you visit, please bring this notice and decision with you.

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NOTICE OF UNFAVORABLE DECISION - TITLE II, TITLE XVI AND TITLE XVIII
(Use in Court-Remanded Cases Only)

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Name and Address of Claimant:

•

SSN:

Date mailed:

Name and Address of Representative:

•

NOTICE OF ADMINISTRATIVE LAW JUDGE DECISION—PLEASE READ CAREFULLY

Enclosed is the Administrative Law Judge's decision on your claim. This notice gives you information about what you can do if you disagree with the decision. Please read this notice and the decision carefully.

If You Disagree With This Decision

If you disagree with the Administrative Law Judge's decision, you may appeal to the Appeals Council. You must do this by filing written exceptions. Exceptions are your statements explaining why you disagree with the decision of the Administrative Law Judge.

- Mail the written statement of your exceptions to the Appeals Council, Office of Hearings and Appeals, P.O. Box 3200, Arlington, VA 22203.
- You must file your written exceptions **within 30 days** from the date you receive this notice. The Appeals Council assumes that you receive this notice within five days after the date at the top of this notice unless you show that you did not receive it within the five-day period.
- If you need more time to file your written exceptions, you must file a written request for additional time with the Appeals Council within 30 days of the date you receive this notice. If you request more than a 30-day extension of time, you must explain why you need the extra time.

- Please **include the Social Security number(s)** shown on the decision on any paper you send to the Appeals Council.

- The Appeals Council will consider your exceptions and the parts of the decision you think are wrong. The Appeals Council may also consider those parts which you think are correct.

- If the Appeals Council concludes that further action is necessary, it will either return your case to an Administrative Law Judge for further action or issue a decision.

- If the Appeals Council issues a decision, its decision may be either more or less favorable to you than the decision of the Administrative Law Judge.

- If the Appeals Council concludes that the decision of the Administrative Law Judge is correct, it will notify you in writing why your exceptions do not warrant a change in the decision of the Administrative Law Judge.

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If You Do Not File Written Exceptions

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New Application

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If you have any questions, please contact your local Social Security office. If you visit, please bring this notice and decision with you.

(8)

No. 90-5538

In the Supreme Court of the United States

OCTOBER TERM, 1990

ZAKHAR MELKONYAN, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

In a Social Security case that has been remanded to the agency by the district court, does the 30-day limitations period for applying for attorney's fees under the Equal Access to Justice Act begin to run when an administrative decision becomes final and not appealable?

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BRIEF FOR THE RESPONDENT

STATEMENT

1. a. On May 28, 1982, petitioner filed an application for disability benefits under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.* On January 30, 1984, an administrative law judge determined after a hearing that petitioner did not have a "severe" impairment and therefore was not disabled within the meaning of the Act. Tr. 6-11;[1] see 20 C.F.R. 416.921; *Bowen* v. *Yuckert*, 482 U.S. 137 (1987). The Appeals Council denied review of the ALJ's decision. Tr. 2. On June 8, 1984, petitioner filed a complaint in the United States District Court for the Central District of California,

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[1] "Tr." refers to the certified copy of the transcript of the administrative record that was filed by the Secretary with the district court, pursuant to 42 U.S.C. 405(g), when petitioner first sought judicial review.

seeking judicial review of the Secretary's decision pursuant to 42 U.S.C. 1383(c)(3), which incorporates the judicial review provisions of 42 U.S.C. 405(g). J.A. 19, 28.

b. On May 30, 1984, shortly before filing his civil action, petitioner filed a second application for SSI benefits, supported by new evidence of disability. On the basis of this second application, petitioner was found to be disabled as of the date it was filed. On October 18, 1984, petitioner filed a motion for summary judgment in his civil action for judicial review of the Secretary's decision denying his first application. That motion was accompanied by the new evidence of disability filed with his second application. J.A. 28.

While petitioner's motion for summary judgment was pending, the Appeals Council, after reviewing the developments in connection with petitioner's second application, decided that it would accept a voluntary remand of the case for further administrative proceedings.[2] The Secretary offered to stipulate to such a remand, but petitioner's counsel refused to do so. Accordingly, on December 18, 1984, the Secretary filed a motion requesting that the court, "pursuant to [petitioner's] prayer for relief in his complaint, order this case be remanded" to the Secretary "for further * * * proceedings." J.A. 6; see J.A. 19, 28.[3] On December 27, 1984, petitioner filed an objection to the Secretary's motion to remand. J.A. 7-8.

[2] Disability benefits may not be paid under the SSI program for any period preceding the date on which an application is filed. 20 C.F.R. 416.501; compare 42 U.S.C. 402(j)(1) (under Title II, benefits may be paid for period of up to 12 months before application was filed), discussed in *Schweiker* v. *Hansen*, 450 U.S. 785, 786-787 (1981). Thus, in finding petitioner disabled on the basis of his second application, the Secretary could not find petitioner disabled as of the date of his first application without further consideration of the first application.

[3] In his prayer for relief, petitioner requested, *inter alia*, that his "claim for supplemental security income be allowed, or in the alternative, that the case be remanded for further proceedings." J.A. 5.

But petitioner subsequently changed his mind, and on March 28, 1985, he filed an "*ex parte* application for an order remanding this case to the [Secretary,] with the belief that this [would] expedite resolution of [petitioner's] claim." J.A. 9-10.[4] In response, the district court entered its "judgment" in the case on April 3, 1985. J.A. 11. The judgment read in its entirety (J.A. 11):

> Defendant's motion to remand, concurred in by plaintiff, is granted. The matter is remanded to the Secretary for all further proceedings.

The judgment did not state that the court was retaining jurisdiction pending the outcome of the proceedings before the Secretary, and it did not order either party to make any further filing in the court at the conclusion of the post-remand administrative proceedings.

Following the remand, the Appeals Council, on May 7, 1985, rendered a decision in which it (1) vacated its prior order refusing review of the ALJ's January 30, 1984, denial of petitioner's first application, (2) vacated the ALJ's decision as well, and (3) found petitioner disabled as of the date (May 28, 1982) on which he had filed his first application. J.A. 14-16. The Appeals Council determined, based on pulmonary function studies submitted in connection with petitioner's second application, that petitioner's impairment was "severe" and that he had been limited to performing "medium" work since May 28, 1982. The Appeals Council then concluded that under the medical-vocational guidelines approved by this Court in *Heckler* v. *Campbell*, 461 U.S. 458 (1983), a finding of disability was required for a person of petitioner's age, education, and work experience who could perform only "medium" work. J.A. 16 (citing 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 3, Rule 203.10 (as made applicable to the SSI program by 20 C.F.R. 416.969)).[5]

[4] In the alternative, petitioner requested that the magistrate issue his report and recommendation. J.A. 9-10.

[5] The Appeals Council's decision concluded by stating that "[t]he component of the Social Security Administration responsible for

2. On May 19, 1986, more than one year after the Appeals Council's decision, petitioner filed an application in the district court for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). J.A. 29.[6] The magistrate recommended that the fee application be denied. J.A. 19-21. The magistrate concluded that the Secretary's pre-remand decision denying petitioner's first application was "substantially justified" within the meaning of EAJA, 28 U.S.C. 2412(d)(1)(A), because the medical reports in the original record did not indicate that he was disabled. J.A. 20-21. On February 17, 1987, the district court, following the magistrate's recommendation, entered an order denying petitioner's application for attorney's fees. J.A. 22.

3. The court of appeals vacated the district court's judgment denying petitioner's application for attorney's fees on the merits and remanded the case with instructions to dismiss the fee application as untimely. J.A. 27-36.

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authorizing supplemental security income payments will advise the claimant regarding the nondisability requirements and, if eligible, the amount and month(s) for which payment will be made." J.A. 16; see also J.A. 12 (similar statement in cover letter to petitioner's counsel). In September 1985, following the necessary computations, petitioner was paid $7,910.39 in SSI benefits for the period from May 28, 1982, to May 30, 1984 (the date of petitioner's second application, on the basis of which he was already receiving benefits). J.A. 24-26. Petitioner did not seek review of the amount of benefits to which he was found to be entitled. See pages 40-41, *infra*.

[6] Petitioner sought attorney's fees in the amount of $4,522.50 (59.5 hours at a rate of $75 per hour), plus $60 in costs. The fees were entirely for services performed by counsel prior to the district court's judgment remanding the case to the Secretary, except for (1) counsel's notifications to petitioner of the district court's judgment remanding the case and of the Appeals Council's post-remand decision, and (2) counsel's preparation of the attorney's fee application. See Decl. of John Ohanion, dated May 19, 1986, appended to Not. of Mot. and Mot. of Pltf. for Award of Attorneys Fees Under The Equal Access to Justice Act.

a. The court of appeals pointed out that under 28 U.S.C. 2412(d)(1)(B), an application for EAJA fees must be filed within 30 days of the "final judgment in the action," a term that is defined as "a judgment that is final and not appealable." J.A. 30 (quoting 28 U.S.C. 2412(d)(1)(B) and (d)(2)(G)). Applying that definition, the court of appeals first concluded that the district court's April 5, 1985, judgment remanding the case to the Secretary could not itself be the "final judgment" for purposes of EAJA, because both parties anticipated that there would be further proceedings after remand. J.A. 30-31. The court then noted that there was no other order of the district court that could serve as the "final judgment" for these purposes, since the district court did not enter a new judgment (or any other order) after the Appeals Council rendered its decision on remand. J.A. 31.

In these circumstances, the court held that the Secretary's final decision after remand—which was the Appeals Council's May 7, 1985, decision finding petitioner disabled as of the onset date alleged in his first application—must be regarded as the "final judgment" for purposes of commencing the 30-day period for filing a fee application under EAJA. In the court's view, that decision satisfied EAJA's definition of a "final judgment," since it was "final and not appealable" by either party. 28 U.S.C. 2412(d)(2)(G). The court explained that because 42 U.S.C. 405(g) authorizes judicial review only by an "individual" who is aggrieved by the Secretary's final decision after a hearing, "the Secretary would not have standing or reason to complain of his own final decision." J.A. 33. "Likewise," the court continued, "if a claimant wholly prevails on his claim, he would have no reason to appeal that decision." *Ibid.*

The court of appeals recognized that, under 42 U.S.C. 405(g), a claimant ordinarily has 60 days within which to seek judicial review of an Appeals Council decision (plus five days between the date of the Appeals Council decision and the date on which the decision is presumed

to be received under governing regulations). J.A. 32 (citing 20 C.F.R. 416.1401, 416.1481, 416.1483 (1988)). Because a typical Appeals Council decision would not be final and unreviewable until after expiration of that 65-day period for seeking judicial review, the court believed that the 30-day period within which to file an EAJA application based on a post-remand decision by the Appeals Council ordinarily would not begin to run until after that 65-day period had passed.[7] But the court concluded that where, as here, the Secretary determines that the claimant was disabled as of the onset date alleged in the claimant's original application, the 30-day period begins to run immediately upon the date of the Appeals Council's decision, since that decision is "not appealable" by either the claimant or the Secretary. J.A. 32. Because petitioner did not seek EAJA fees until more than one year after the Secretary rendered his fully favorable post-remand decision, and because in its view the 30-day filing period under EAJA is jurisdictional, the court of appeals held that the district court lacked jurisdiction to entertain petitioner's EAJA application. J.A. 29, 33.

b. In so ruling, the court of appeals declined to follow the "different approach" adopted by the Fourth Circuit in *Guthrie* v. *Schweiker*, 718 F.2d 104 (1983). J.A. 33-35. There, the Fourth Circuit relied on language in the sixth sentence of 42 U.S.C. 405(g) that requires the Secretary, after a remand covered by that sentence, to file with the district court his modified findings of fact and decision, as well as a transcript of the additional administrative record. 718 F.2d at 106; see *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2664-2665 (1990). The Fourth Circuit reasoned in *Guthrie* that after such a filing, the district court should enter an order affirming, modifying, or reversing the Secretary's post-remand decision; such a judicial order could then serve as the "final

[7] The court of appeals presumably was of the view that if the claimant *did* seek judicial review within the 65-day period, an EAJA application could be filed within 30 days after the district court's judgment terminating that component of the proceedings became final and not appealable.

judgment" that would commence the running of the 30-day filing period under EAJA. See J.A. 33 (citing 718 F.2d at 106).

The Ninth Circuit in this case found the *Guthrie* approach "troublesome." J.A. 34. It noted that 42 U.S.C. 405(g) does not confer upon the district court independent power to review any post-remand filing by the Secretary.[8] Accordingly, the court of appeals reasoned, the merits of the Secretary's post-remand decision, like the Secretary's original decision, may be reviewed by the district court only if the claimant seeks judicial review of that decision within the 60-day period allowed by 42 U.S.C. 405(g). J.A. 34. Unless the ordinary requirements for judicial review are met, the court continued, it was "at a loss to find a basis for a district court to enter any order or judgment affirming, modifying, reversing or remanding the Secretary's post-remand filing." *Ibid.* Nor could the court below "see any advantage to such an approach," because "[i]f the Secretary's decision is wholly in favor of the claimant," there is no "need for overburdened district courts to deploy scarce judicial resources in a sua sponte 'affirmation' of uncontested eligibility decisions." *Ibid.*

In addition, the court of appeals found it significant that *Guthrie* was decided before the 1985 amendments to EAJA, which "effectively redefined" the term "final judgment" to mean a "judgment that is final and not appealable." J.A. 34-35 (quoting 28 U.S.C. 2412 (d)(2)(G)). Although the Fourth Circuit had assumed in *Guthrie* that the term "final judgment" referred only to an order of the sort a court may enter, as under Fed. R. Civ. P. 54, the court below found no reason in the amended version of EAJA to conclude that the term is so

[8] The Ninth Circuit apparently was of the view that Section 405(g) requires the Secretary to file the post-remand decision, findings, and transcript with the district court in *all* remanded cases. See J.A. 34. However, this Court's subsequent decision in *Sullivan* v. *Finkelstein* makes clear that this requirement applies only to the limited category of cases covered by the sixth sentence of Section 405(g). See pages 26-27, *infra*.

limited. The court of appeals therefore held that the term "judgment" in this context does not require an order by a court, but may instead consist of a final and unreviewable administrative decision following a remand from a court. J.A. 34-35.

c. Finally, the court of appeals noted that its approach "not only sets definite limits for purposes of finality, but it also benefits individuals seeking EAJA awards under section 2412 in similar circumstances." J.A. 35. "Rather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district court," the court explained, "such individuals may seek EAJA awards as soon as the agency's action on remand becomes a 'final judgment' under section 2412(d)(2)(G)." *Ibid.*

SUMMARY OF ARGUMENT

1. a. The holding below—that the 30-day limitations period for filing an EAJA application begins to run when the Secretary's post-remand decision becomes final and not appealable—is correct. The decision is consistent with the governing statutes and with the analysis in this Court's decisions in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), and in *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658 (1990). Moreover, the rule adopted by the court below serves to benefit all concerned—the courts, private claimants, and the Secretary—by eliminating any need for pointless filings and rulings and by expediting the process of considering applications for EAJA awards.

Petitioner's approach, in contrast, would impose on the parties and the courts a cumbersome and unnecessary procedure that finds no basis in any governing statute. It would require that before the limitations period for filing an EAJA application can begin to run in a case that has been remanded to the Secretary, the Secretary's decision on remand must be filed with the district court, the district court must enter some sort of order that would constitute a "final judgment," and the time for appealing from that order must expire without an appeal being taken.

b. The term "final judgment," as used in EAJA, is broad enough to encompass a post-remand administrative determination that is final and no longer subject to appeal. This conclusion is buttressed not only by the definition of the term "judgment" in both standard and legal dictionaries, but by the context in which the term is used in EAJA itself and by the legislative history of the 1985 provisions clarifying the meaning of the statute. A critical aspect of that clarification was the rejection of an "overly technical" construction of the phrase that tied it too closely to the concept of a final judgment of a district court.

Moreover, the construction of EAJA adopted by the court below is supported by this Court's decisions in *Hudson* and in *Finkelstein*. The Court in *Hudson*—focusing on the interpretation of EAJA—rejected a narrow definition of "civil action" that limited its scope to proceedings in district court and instead endorsed a definition that embraced administrative proceedings on remand from the district court. By the same rationale, the term "final judgment," as used in EAJA, should be construed to embrace a final, non-appealable decision rendered in those same administrative proceedings. And in *Finkelstein*, the Court held that for substantive purposes (and for purposes of determining appealability), an action in the district court comes to an end when it is remanded to the Secretary for further proceedings; nothing remains to be done in the district court in order to achieve "finality" once the proceedings before the Secretary have terminated in a final and unreviewable administrative decision.

The rationale of the *Finkelstein* decision, which strongly supports the result below, does not directly apply to a district court order sending a case back to the Secretary under the sixth sentence of 42 U.S.C. 405(g), and thus further action by the district court may be a prerequisite to the existence of a "final judgment" in such cases. But that question need not be resolved here,

since the district court's order of remand in this case was *not* issued pursuant to the sixth sentence of Section 405(g). Rather, like the order in *Finkelstein*, it served to terminate the proceedings in the district court.

c. The court of appeals decisions relied on by petitioner do not support his position. Each of those cases was decided before this Court's decisions in *Hudson* and *Finkelstein*, and the premises about the operation of 42 U.S.C. 405(g) on which they rest have since been shown to be false. Moreover, the same mistaken premises underlie the passages in the 1985 legislative history on which petitioner also relies.

d. Many practical considerations militate in favor of the approach adopted below, especially if, as we urge, the approach is modified so that the time in all cases begins to run only when the period for seeking further review of the Secretary's decision has expired. The approach, as noted, has the advantage of eliminating pointless and unnecessary steps and of expediting the consideration of EAJA applications. And, particularly if our modification is accepted, it would have none of the disadvantages attributed to it in petitioner's brief.

2. There is no reason for this Court to exempt petitioner from the time limits imposed by law for the filing of an EAJA application. The question of the retroactive application of this Court's (or the Ninth Circuit's) ruling as a general matter may properly be left to the lower courts in the first instance. And if the Court believes that retroactivity should be addressed specifically with respect to petitioner's application, we suggest that the Court remand to the court of appeals for further proceedings on that issue, since it was not addressed in the decision below.

In any event, as petitioner recognizes, a jurisdictional ruling must be given retroactive effect, and the time limit for filing EAJA applications remains a jurisdictional one, even after this Court's decision in *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453 (1990). Moreover, even if equitable tolling, or a prospective ruling, were not completely foreclosed in this context, there is no basis on this record for excusing petitioner's filing delay of over nine months under the retroactivity principles of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971): the Ninth Circuit did not overrule clearly established circuit precedent in rendering the decision below; prospective application is not necessary to fulfill EAJA's purpose of removing a possible obstacle to retaining counsel to challenge governmental action, since petitioner and others raising this issue have had the assistance of counsel; and retroactive application will not produce unfair results, in light of petitioner's failure to press his attorney's fee claim promptly.

ARGUMENT

I. IN AN ACTION FOR JUDICIAL REVIEW UNDER THE SOCIAL SECURITY ACT IN WHICH THE DISTRICT COURT HAS REMANDED THE CASE TO THE SECRETARY, THE 30-DAY LIMITATIONS PERIOD FOR FILING AN APPLICATION FOR ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT BEGINS TO RUN IF AND WHEN THE SECRETARY'S POST-REMAND DECISION BECOMES FINAL AND NOT APPEALABLE

A. Introduction

The court of appeals correctly held that, in circumstances where a Social Security case is remanded to the Secretary for further administrative proceedings, the 30-day limitations period for filing an application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(B), commences when the post-remand decision of the Secretary become final and not appealable. That holding comports with the text and purposes of 42 U.S.C. 405(g) and of EAJA, as well as with the analytical framework of this Court's decisions in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), and *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658 (1990).

The three other courts of appeals that have considered the question since *Hudson* and *Finkelstein* have agreed with the Ninth Circuit's ruling in this case. See *Richard*

v. *Sullivan*, No. 90-4597 (5th Cir. Feb. 28, 1991); *Buck* v. *Secretary of HHS*, No. 89-4130 (6th Cir. Jan. 18, 1991);[9] *Jabbay* v. *Sullivan*, 920 F.2d 472 (7th Cir. 1990). These decisions follow a straightforward rule that comports with the statutory scheme and common sense. If the claimant does not seek further review of the Secretary's post-remand decision within the time allowed, then all proceedings on the question of his disability (the subject matter of the civil action) are at an end. Since neither the Secretary nor the claimant may seek judicial review on the merits at that point, there is no occasion under 42 U.S.C. 405(g) for the court to take further action. All that remains (aside from the often ministerial task of calculating and paying benefits) is for the claimant to seek attorney's fees under EAJA.[10] The decision below permits the claimant to file for and be awarded EAJA fees immediately when the post-remand decision becomes final, without awaiting further action by the Secretary and the court; and the triggering of the 30-day filing period at that point ensures that all proceedings concerning the claimant's disability will be brought promptly to a close. The decision below also properly places the burden on the claimant—the moving party on the EAJA question—to invoke the jurisdiction of the court by filing a fee petition within 30 days.

As petitioner points out (Br. 16-19), several court of appeals decisions prior to *Hudson* and *Finkelstein* had suggested a different approach. See *Guthrie* v. *Schweiker*, 718 F.2d at 106; *Brown* v. *Secretary of HHS*, 747 F.2d 878, 884-885 (3d Cir. 1984); *Taylor* v. *Heckler*, 778 F.2d 674, 677 (11th Cir. 1985). But the essential premises of those decisions have since been shown by *Hudson* and *Finkelstein* to be wrong. See pages 30-32, *infra*. Moreover, those decisions would superimpose on 42 U.S.C. 405(g) certain mandatory procedures that have no basis in law and that may complicate and delay the final resolution of disability claims and fee petitions.

[9] The Sixth Circuit previously had reached the same result in an unpublished decision, *Gordon* v. *Secretary of HHS*, No. 90-1206 (Oct. 15, 1990).

[10] The attorney may also seek to recover attorney's fees from the claimant pursuant to 42 U.S.C. 406 in Title II cases. See pages 38-40, *infra*.

Under petitioner's view, if for any reason a claimant does not seek judicial review of the Secretary's post-remand decision, and thus allows that decision to become final and nonreviewable, there still is no "final judgment" in the case, for purposes of EAJA, unless and until the district court also enters some sort of order. It follows, under petitioner's position, that for an EAJA award to be available in these circumstances, the Secretary must make a filing with the district court following completion of the proceedings on remand in *every* case; and after the Secretary makes such a filing, the district court must enter an order affirming, modifying, or reversing the Secretary's final post-remand decision in *every* case. Such an order by the district court, once it becomes final and not appealable, could then serve as the "final judgment" for purposes of commencing the 30-day filing period under EAJA. See Pet. Br. 17-19, 23, 25-26, 29-31. The Secretary and the district court apparently would have to follow this procedure even if neither the claimant nor the Secretary wanted to present any issue to the court concerning the merits of the Secretary's post-remand decision, and indeed even if the claimant had no intention of actually applying for EAJA fees.[11]

The elaborate construct petitioner proposes finds no basis in 42 U.S.C. 405(g), the statutory provision enacted by Congress to govern judicial review of decisions by the Secretary on claims for Social Security benefits. Specifi-

[11] Perhaps the claimant could initiate the process by filing the decision on remand with the district court, and by requesting the district court to enter an order affirming it, if the Secretary did not do so. But petitioner did not follow that course. Moreover, as the delay in this case illustrates, it does not appear that there would be any time constraints on such action by the claimant (unless the 60-day period in 42 U.S.C. 405(g) would apply to his filing). Thus, the period for seeking an EAJA award might be indefinitely extended.

cally, nothing in 42 U.S.C. 405(g) requires a filing in court following every post-remand decision, including those that the claimant has allowed to become final and not appealable, nor does anything in Section 405(g) contemplate any further role for the district court in such cases. See pages 23-25, *infra*.[12] Despite this statutory silence, petitioner would impose two additional layers of mandatory procedure—a filing with the district court of the decision on remand, followed by an order of the district court affirming, modifying, or reversing the Secretary's uncontested decision on the merits—solely to facilitate EAJA applications. Petitioner seeks, in other words, to make the EAJA tail wag the Section 405(g) dog.

The flaw in this approach is not only its cumbersomeness but its conflict with the design of EAJA—to take the procedures applicable to the particular civil action as it finds them, and to effectuate the purposes of EAJA within that statutory context. See *Hudson*, 490 U.S. at 889 ("we must endeavor to interpret the fee statute in light of the statutory provisions it was designed to effectuate"). It therefore is necessary to locate within the procedures that have been independently prescribed by statute and rule the decision that may most properly be regarded as the "final judgment" in the case for purposes of EAJA's 30-day filing requirement. In the present context, that decision is the post-remand administrative decision of the Secretary, once it has become "final and not appealable." 28 U.S.C. 2412(d)(2)(G).

The rule petitioner proposes also presents significant practical difficulties that can be avoided under the Ninth Circuit's construction. First, petitioner's rule would require many pointless post-remand filings in the district courts and pointless post-remand orders by those courts,

[12] A subsequent filing with the district court is required only in the special category of cases covered by the sixth sentence of Section 405(g). Even then, it is not clear that the filing requirement should apply where the Secretary has rendered a fully favorable decision on remand, since there is no longer a live case or controversy regarding the claimant's disability. See pages 26-27 & note 24, *infra*.

for in a large number of cases arising under the vast Social Security programs, the claimant will not apply for the EAJA fees that petitioner's proposal purports to facilitate.[13]

Second, even in those cases in which the claimant might ultimately file an application for EAJA fees, petitioner's submission would require unnecessary steps and complications in the fee-application process. Under the approach adopted by the Ninth Circuit and the other courts that have followed it, the claimant initiates the EAJA fee process by filing an application with the court—an application the government may then choose not to contest. That streamlined procedure is especially appropriate in the present context, since the number of EAJA appli-

[13] In fiscal year 1989, 7,921 new cases were filed in the district courts under the Social Security Act; 6,616 cases pending during that year resulted in final court decisions (not including remands); and 1,856 of those dispositions were reversals. In addition, 6,432 remands were processed by the Appeals Council during 1989. See Social Security Administration, *Annual Report to the Congress* 29 (Apr. 1990). Under petitioner's theory, a post-remand filing with the district court was evidently required in all 6,432 of the latter cases.

By contrast, the *1990 Annual Report of the Director of the Administrative Office of the United States Courts* states (at 1-26 (Table 21)) that in 1990, 375 EAJA applications were filed in the district courts in cases involving HHS (342 of those applications were granted). HHS's own statistics show a higher rate of EAJA filings. We have been informed by HHS that data it has generated show that in fiscal year 1990, there were 4,343 remands processed by the Appeals Council, 2,696 (62%) of which were favorable to the claimant, and 1,377 court decisions favorable to the claimant, resulting in a total of 4,073 favorable decisions. Further, in fiscal year 1990, EAJA fees were awarded in 1,697 (41.7%) of those cases. By any measure, then, there are many post-remand administrative decisions that are favorable to the claimant but that do not lead to an EAJA application.

The same HHS data show that in prior years, the percentage of favorable decisions on remand was generally higher (ranging from 68% in 1986 and 1987 to 80% in 1989). The percentage of favorable decisions overall (court and post-remand) in which EAJA fees have been awarded has grown steadily from 8.4% in 1985, to 21.4% in 1989, to 41.7% in 1990.

cations in Social Security cases is substantial, while the amount of EAJA awards in such cases is relatively small. See *Commissioner, INS* v. *Jean*, 110 S. Ct. 2316, 2322 n.12 (1990) (noting that 90% of EAJA fee awards in 1989 were in HHS cases and that these awards averaged less than $3000 each). By contrast, petitioner's position apparently would require a filing of the Secretary's decision with the court as a precondition to any possible award of fees, and the district court apparently would be required to enter an order on the merits, constituting the "judgment" in the case, in addition (and perhaps prior) to passing on the EAJA application. As the court below observed, if the Secretary's post-remand decision is fully favorable to the claimant (or if the claimant for some other reason elects to forgo further review of that decision), there is no "need for overburdened district courts to deploy scarce judicial resources in a sua sponte 'affirmation' of uncontested eligibility decisions." J.A. 34.

Third, the steps petitioner urges this Court to mandate would lead to delay in the EAJA application process itself. By contrast, as the court below explained, its approach "not only sets definite limits for purposes of finality, but it also benefits individuals seeking EAJA awards." J.A. 35. This is so because "[r]ather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district court, such individuals may seek EAJA awards as soon as the agency's action on remand becomes a 'final judgment' under section 2412(d)(2)(G)." *Ibid.*

These practical considerations weigh strongly in favor of the Ninth Circuit's approach, because it "comports with the intent of EAJA to lessen the economic burden on the individual who must litigate against the government in order to vindicate his rights." Note, *EAJA: An Analysis of the Final Judgment Requirement As Applied to Social Security Disability Cases*, 58 Ford. L. Rev. 1269, 1285 (1990); see *id.* at 1282, 1285-1287. Other courts of appeals have made the same point. See *Richard* v. *Sullivan*, slip op. 9 ("To require some process of "certification' or 'validation' by the district court would result only in a useless exercise wasting judicial resources."); *Jabbay* v. *Sullivan*, 920 F.2d at 474 (approach advocated by petitioner "leads to unnecessary delays in litigation"). This Court has stressed the importance of such considerations, as well as simplicity of judicial administration, in the interpretation and application of EAJA. See *Commissioner, INS* v. *Jean*, 110 S. Ct. at 2321-2323 & n.14; *Sullivan* v. *Hudson*, 490 U.S. at 883-884; *Pierce* v. *Underwood*, 487 U.S. 552, 559-563 (1988).

B. It Is Consistent With 42 U.S.C. 405(g) And With EAJA To Hold That A Post-Remand Decision Of The Secretary That Is Final And Not Appealable Is A "Final Judgment" For Purposes Of EAJA

As relevant here, EAJA provides that "a court shall award to a prevailing party * * * fees and other expenses * * * incurred by that party in any civil action * * *, including proceedings for judicial review of agency action, brought by or against the United States * * *, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). Section 2412(d)(1)(B) provides that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses." The term "final judgment" in turn is defined to mean a judgment that is "final and not appealable." 28 U.S.C. 2412(d)(2)(G). The Ninth Circuit's decision is fully consistent with these provisions.

1. EAJA clearly presupposes the independent existence of an order in a "civil action" that may also serve as the "final judgment" for purposes of triggering the 30-day period for seeking an EAJA award. In the present case, the court of appeals' conclusion—that the Appeals Council decision became the "final judgment" once it became final and unreviewable[14]—seems inescapable. As the

[14] As explained below (see pages 35-38, *infra*), we believe that the Appeals Council's post-remand decision became "final and not

court of appeals pointed out, the district court's judgment remanding the case to the Secretary was not a final judgment for EAJA purposes at the time it was entered, since both parties and the court contemplated that there would be further proceedings before the Secretary on the disability issue;[15] and after completion of the proceedings on remand, the district court did not enter another order that could be deemed a "final judgment." See J.A. 31.

Petitioner contends (Br. 12-15), however, that only an order entered by a court can be a "final judgment" for these purposes. Accordingly, petitioner takes the position that even after expiration of the 60-day period for seeking judicial review of the Appeals Council's post-remand decision, that decision was not a "final judgment." On this theory, there still was no "final judgment" in this case when the Ninth Circuit rendered its decision, even though almost 4½ years had elapsed since the Appeals Council rendered its decision, because the district court had not entered an order affirming, modifying, or reversing the Appeals Council's decision—the action petitioner believes is necessary to trigger the limitations period for filing an EAJA fee.[16]

Neither the term "judgment" nor EAJA's definition of a "final judgment" (in Section 2412(d)(2)(G)) is limited to an order entered by a court. A leading American dictionary defines "judgment" as "a formal decision or determination given in a cause by a court of law *or other tribunal*," *Webster's Third New International Dictionary* 1223 (1986) (emphasis added), a definition plainly broad enough to encompass a decision by the Appeals Council. Petitioner objects (Br. 12-13) that this is a definition for laypersons, and in support of his argument that the legal definition is narrower, asserts (Br. 12-13) that nowhere in the definition of "judgment" in *Black's Law Dictionary* 841-842 (6th ed. 1990) is there any suggestion that the term extends to decisions of administrative tribunals. Yet, two sentences after the excerpt petitioner quotes (Br. 12), the definition states that a judgment is a "[d]ecision or sentence of law, given by a court of justice *or other competent tribunal*, as the result of proceedings instituted therein." *Black's* 842 (emphasis added). And still later, the *Black's* definition states that the "[t]erms 'decision' and 'judgment' are commonly used interchangeably." *Ibid.*

Consistent with the dictionary definitions, an adjudicatory decision by an administrative tribunal is often accorded the same effect for purposes of issue and claim preclusion as the judgment of a court. See *University of Tennessee* v. *Elliott*, 478 U.S. 788, 796-799 (1986); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966) (noting that *res judicata* applies where an administrative agency sits in a "judicial" capacity). Indeed, decisions of administrative agencies are regarded as a proper subject of the Restatement of Judgments.[17]

To be sure, "judgment" may also be used as a term of art having special application to judicial proceedings. But in that setting, a "judgment" typically refers to an

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appealable" not on the date of its issuance, as the Ninth Circuit held, but on expiration of the period within which petitioner could have sought judicial review. This difference, however, has no effect on the outcome of this case.

[15] See note 20, *infra*. When it amended EAJA in 1985, Congress rejected provisions in the House bill that would have permitted a claimant to apply for fees within 30 days of a remand order in an action under 42 U.S.C. 405(g) or 1383(c)(3) and declared the claimant a "prevailing party" at that point. H.R. 5479, 98th Cong., 2d Sess. §§ 2(a)(3) and (b)(3) (1984); see H.R. Rep. No. 992, 98th Cong., 2d Sess. 2-3, 12-13 (1984); 130 Cong. Rec. 29,276, 30,151, 30,152, 30,153-30,154, 31,406-31, 407 (1984).

[16] On June 27, 1990, pursuant to the Ninth Circuit's mandate, the district court entered a judgment and order dismissing the action.

[17] See Restatement (Second) of Judgments § 83, at 269 (1982) (quoted in *University of Tennessee* v. *Elliott*, 478 U.S. at 798 n.6):

> Where an administrative forum has the essential procedural characteristics of a court, . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.

order of a court that *is* appealable. See Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."); *Finkelstein*, 110 S. Ct. at 2665 ("appealable" is "a meaning with which 'final' is usually coupled"). EAJA's definition fundamentally departs from that usage by requiring that an order be "final and *not* appealable" in order to be a "final judgment". 28 U.S.C. 2412(b)(2)(G) (emphasis added). This significant departure from the usual characteristics of a "judgment" entered by a court reinforces the conclusion that Section 2412(b)(1)(B) should not be read implicitly to limit the "final judgment[s]" that trigger the 30-day filing period to orders that have been entered by courts. Cf. *Bell* v. *United States*, 462 U.S. 356, 360-361 (1983).

2. Our reading of the statutory text is supported by its legislative history. The definition of the term "final judgment" in 28 U.S.C. 2412(d)(2)(G) was added in 1985 [18] to resolve a conflict in the lower courts on the question whether a "judgment" was to be regarded as "final" for EAJA purposes when it was entered, or only when the period for taking an appeal had lapsed. In holding that the 30-day period began to run immediately upon entry of the court's judgment, the Ninth Circuit in *McQuiston* v. *Marsh*, 707 F.2d 1082, 1085 (1983), had simply concluded, without analysis, that the term "final judgment" "should be defined by its common usage in contexts such as 28 U.S.C. 1291, Fed. R. App. P. 4(a), and Fed. R. Civ. P. 54." By contrast, in holding that a district court's judgment is not "final" for these purposes until after the time for taking an appeal has expired, the Seventh Circuit in *McDonald* v. *Schweiker*, 726 F.2d 311 (1983), had rejected what it regarded as *McQuiston*'s superficial and technical construction of "final judgment," observing that the term "does not have a single fixed meaning" and that it therefore is necessary to find the meaning that is "inferable from context." *Id.* at 313. Viewing its choice to be whether the 30-day

[18] Pub. L. No. 99-80, § 2(c)(2), 99 Stat. 185.

period "runs from the end of the district court proceedings or from the end of all the proceedings," the Seventh Circuit was heavily influenced by practical considerations and chose the latter construction. *Id.* at 314; accord *Massachusetts Union of Public Housing Tenants* v. *Pierce*, 755 F.2d 177, 179 (D.C. Cir. 1985).

The clarification of the term "final judgment" in the 1985 amendments was expressly intended to "ratif[y] the approach taken by the courts in" *McDonald* and *Massachusetts Union*. See H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. II, at 6 n.26 (1985); S. Rep. No. 586, 98th Cong., 2d Sess. 16 (1984). By the same token, the 1985 amendments manifest a rejection of the narrow and technical construction of the term "final judgment" in *McQuiston*, based on 28 U.S.C. 1291, Fed. R. App. P. 4(a), and Fed. R. Civ. P. 54—the types of sources to which petitioner would look for guidance. In fact, the House Report explicitly states that "final judgment" and several related terms should not be given an "overly technical" construction, H.R. Rep. No. 120 *supra*, Pt. II, at 6 n.26, and stresses the need to "give both courts and litigants clear guidance on what is expected" and to avoid "unnecessary confusion" concerning when an application must be filed. *Id.* Pt. I, at 7. Similarly, the Senate Report broadly states that a prevailing party may file a fee petition within 30 days of "the final disposition of the case on the merits." S. Rep. No. 586 *supra*, at 16. The decision below is faithful to this congressional purpose because it refrains from giving the term "final judgment" an "overly technical" (and self-defeating) construction and furnishes "clear guidance," and because the Appeals Council's post-remand decision was "the final disposition of [petitioner's] case on the merits."

Furthermore, the result below is consistent with the congressional purpose to fix a definite time limitation on the filing of fee applications once all proceedings on the merits have terminated. A post-remand decision that the claimant declines to appeal to the next stage of the ad-

ministrative review process or (as here) to the courts effectively ends the underlying litigation and immediately enables the reviewing court to determine whether the claimant is a prevailing party and is otherwise entitled to fees under EAJA. A construction that would nonetheless make resolution of the attorney's fee issue contingent upon completion of additional (yet pointless) procedural steps in the district court would invite needless and potentially indefinite delay in the resolution of fee questions—a result that is plainly at odds with the 30-day time limit on fee applications that Congress prescribed.[19]

3. The Ninth Circuit's application of the 30-day filing requirement is strongly buttressed by this Court's decisions in *Hudson* and *Finkelstein*.

a. In *Hudson*, the Court held that in a Social Security case brought under 42 U.S.C. 405(g), the "civil action" for which attorney's fees may be awarded under 28 U.S.C. 2412(b)(1)(A) may include the proceedings before the Secretary following a remand from the district court. The Court relied on its past decisions under other fee-shifting statutes indicating that "where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." 490 U.S. at 888; see also *id.* at 892 ("administrative proceedings may * * * be considered part of the 'civil action' for purposes of a fee award"). Accord, *Commissioner, INS* v. *Jean*, 110 S. Ct. at 2320-2321 (citing *Hudson*) (EAJA "favors treating a case as an integrated whole, rather than as atomized line-items").

As noted above, the operative language here requires a party to file his EAJA application "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)

[19] For further discussion of the history of the 1985 Act, and particularly of the House committee report heavily relied on by petitioner (Br. 23), see pages 33-34, *infra*.

(1)(B). Since, as held in *Hudson*, the concept of the "civil action" in this setting may extend to the administrative proceedings following a remand by the district court, the "final judgment" in such a civil action similarly may consist of the decision of the Secretary that terminates those proceedings on remand. Specifically, where the Secretary's decision following the remand finds the claimant disabled (and the period for seeking judicial review under 42 U.S.C. 405(g) has lapsed), that decision is "final and not appealable" by either the claimant or the Secretary. See 28 U.S.C. 2412(d)(2)(G). Such a decision of the Secretary terminates not only the administrative proceedings themselves, but also the overall "civil action," of which those proceedings on remand are the last stage. In fact, a final, post-remand administrative decision that the claimant has chosen not to contest eliminates any basis for a continuing case or controversy in court, and thereby effectively moots the case. The decision of the Secretary therefore is properly regarded as the "final judgment in the [civil] action" that commences the running of the 30-day limitations period.

Significantly, the Court in *Hudson* explicitly rejected the Secretary's argument that because *Black's Law Dictionary* defines the term "action" to mean "a suit brought in a court," the "civil action" for which fees may be recovered under EAJA should not be construed to include fees for services rendered in administrative proceedings on remand from the court. See 490 U.S. at 891. The Court's rejection in *Hudson* of a narrow definition of "action" lends firm support to rejection of the narrow (and impractical) definition of "judgment" that is advanced by petitioner.

b. Petitioner's basic position—that there can be no "final judgment" terminating the civil action unless and until the district court takes some further action subsequent to the Secretary's final decision on remand—also is flatly inconsistent with *Finkelstein*. There, the Court held that in an action for judicial review pursuant to 42 U.S.C. 405(g), a district court order reversing the

Secretary's denial of benefits and remanding the case to the Secretary for further proceedings is a "final judgment" subject to immediate appeal by the Secretary under 28 U.S.C. 1291. The Court found in the structure of 42 U.S.C. 405(g) an indication that each final decision of the Secretary (*i.e.*, the first such decision and the decision rendered after remand) "will be reviewable in a separate piece of litigation." 110 S. Ct. at 2663. Accordingly, for purposes of Section 405(g) and 28 U.S.C. 1291, the district court's order remanding the case to the Secretary "terminated the civil action" challenging the Secretary's first decision denying benefits. *Id.* at 2664. Thus, there is nothing in the nature of a civil action for judicial review under 42 U.S.C. 405(g), or of a remand order entered at the conclusion of such an action, that requires the district court to do anything further after the remand.

c. In sum, *Hudson* held that "for purposes of the EAJA," the administrative proceedings after remand may be considered "part and parcel of the [civil] action for which fees may be awarded." 490 U.S. at 888. See *Finkelstein*, 110 S. Ct. at 2666. Nothing in this holding regarding the services for which fees may be awarded requires the *district court* to take any further action, after remand, to terminate the civil action on the merits. To the contrary, the Court made clear in *Finkelstein* that despite its prior holding in *Hudson*, the civil action was terminated, insofar as any substantive role of the district court was concerned, when it remanded the case to the Secretary. 110 S. Ct. at 2666-2667. Thus, *Hudson* and *Finkelstein* together contemplate that a "civil action" under 42 U.S.C. 405(g) extends (for purposes of EAJA) to the administrative proceedings on remand, but that the civil action, as so extended, terminates (for purposes of EAJA) if the Secretary renders a decision on remand that becomes "final and not appealable" by either party when the time for seeking further review expires. Contrary to petitioner's

contention (Br. 24-33), then, the decision below is fully consistent with both *Hudson* and *Finkelstein*.[20]

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[20] Even if petitioner were correct that the "judgment" to which EAJA refers must be a court order, it would not follow that petitioner's EAJA application was timely. As we have explained, because EAJA takes the statutory scheme under which the particular "civil action" arises as a given, EAJA does not require the district court to enter a post-remand order on the merits, which could then serve as a "judgment" for purposes of commencing the 30-day limitations period. Accordingly, some *other* order that was entered in the case, independently of EAJA, would have to serve as the "judgment" for these purposes. In our view, that "judgment" would be the order in which the court remanded the case to the Secretary; that order would become "final and not appealable" for purposes of commencing the 30-day limitations period under EAJA if, as in this case, the claimant declined to seek judicial review in a timely manner following completion of the administrative proceedings on remand. The reasons are as follows:

Under *Finkelstein*, the order remanding the case to the Secretary is a "judgment" that is "final" in the sense that the Secretary may take an immediate appeal under 28 U.S.C. 1291 (except in the category of special remands governed by the sixth sentence of 42 U.S.C. 405(g)). But if the remand goes forward, the question of the claimant's disability would again be before the district court if the claimant sought judicial review of the Secretary's post-remand decision. The district court's disposition of that second action for judicial review might in turn be appealed by either the Secretary or the claimant, depending upon who was aggrieved. Such a post-remand appeal might raise legal issues that were addressed by the district court at the time of the remand (to the extent those issues remain subsumed in the district court's post-remand disposition). In that event, the post-remand appeal would, in substance, constitute an appeal of the district court's order remanding the case to the Secretary. The district court's prior order remanding the case would remain "appealable" in this sense as long as it was possible that the case would return to the district court on the merits.

Under the foregoing analysis, if the claimant does not seek judicial review of the Secretary's post-remand decision within the 60-day period allowed by 42 U.S.C. 405(g), the possibility of any further judicial proceedings (including an appeal to the court of appeals) on the question of disability is terminated. At that point, the district court's prior order remanding the case to the Secretary would become "final and not appealable [to the court of appeals]" for purposes of EAJA, and the 30-day limitations period would begin to run. That, of course, is the same point at which the

4. a. In arguing at the petition stage that some further action by the district court is necessary to the existence of a "final judgment" under EAJA, petitioner relied (Pet. 5) on the sixth and seventh sentences of 42 U.S.C. 405(g).[21] Petitioner apparently was of the view that these provisions require the Secretary to file his decision on remand (as well as his findings and the additional record) with the district court in *every* case, and that the district court must then enter a judgment on the basis of that filing.

It is unclear whether petitioner renews this broad reading of the sixth and seventh sentences of Section 405(g) in his merits brief. See Br. 17-19, 31. In any event, the argument ignores the fact that, as *Finkelstein* held, the sixth and seventh sentences do not apply to all remands by the district court in cases under Section 405(g). They instead are concerned with a special category of cases: those in which the district court remands the case to the Secretary on the Secretary's motion made for good cause before he files his answer, or in which the district court orders that new evidence be taken before the Secretary, where the evidence is material and there is good cause for the failure to incorporate it in the record during the prior administrative proceedings. 110 S. Ct. at 2664-2665.[22] In those instances, it appears that

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30-day period begins to run under our principal submission herein, because the Secretary's post-remand decision also becomes "final and not appealable [to the district court]" if the claimant forgoes his opportunity to seek judicial review of that decision.

[21] These sentences provide, in pertinent part, that "the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. * * * Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision."

[22] The statute does not even refer to the latter procedure—ordering that new evidence be taken—as a "remand."

the case formally remains within the jurisdiction of the district court during the ancillary proceedings before the Secretary; but these special provisions are inapplicable to all other remands in civil actions under Section 405(g). For the same reason, petitioner errs in relying (Br. 25) on the passing reference in *Hudson* (490 U.S. at 887.) to the description of the sixth sentence of Section 405(g) in *Guthrie* v. *Schweiker*, 718 F.2d at 106. This Court subsequently recognized in *Finkelstein* that the sixth and seventh sentences have a far narrower scope, and it declined to follow the broader implications of the language in *Hudson*. See 110 S. Ct. at 2666-2667.

We therefore may put to one side petitioner's erroneous reliance on the sixth and seventh sentences of 42 U.S.C. 405(g) to support his contention that the Secretary is required by law to make a post-remand filing with the district court in *every* case, and that the district court must then enter an order affirming, modifying, or reversing the Secretary's post-remand decision. Yet if the post-remand obligations petitioner seeks to impose on the Secretary and the district courts are not compelled by Section 405(g), they are not compelled at all. Petitioner never comes to grips with this complete absence of any legal basis for the procedural framework he proposes.

b. Perhaps appreciating this central flaw in his position in the wake of *Finkelstein*, petitioner asserts (Br. 31-32) that the district court's remand order in this case in fact was entered pursuant to the sixth sentence of Section 405(g), and that the Secretary therefore was required to file his post-remand decision in this case with the district court, which could then have entered a "final judgment" affirming, modifying or reversing that decision. This argument is without merit.

Nothing in the district court's order in this case suggests that the remand was pursuant to the sixth sentence of Section 405(g): there is no indication that the remand was to be of only limited scope and that the district court was retaining jurisdiction with the intention of entering its final judgment on the merits at a later date,

after the Secretary filed modified findings and a new decision with the court. To the contrary, the court expressly styled its order a "judgment" and stated that "the matter is remanded to the Secretary *for all further proceedings*." J.A. 11 (emphasis added). The district court thus clearly contemplated that it was doing just what the district court did in *Finkelstein*: terminating all judicial proceedings on the merits of petitioner's claim for benefits and returning the matter entirely to the jurisdiction of the Secretary.

Contrary to petitioner's suggestion (Br. 31), the mere fact that the request for a remand might have been prompted by the development of new evidence of disability in connection with petitioner's second application does not mean that the remand was *pursuant* to the sixth sentence of Section 405(g) (which permits the court to order the Secretary to take new evidence). The district court's judgment did not cite the sixth sentence of Section 405(g), and the district court did not make the findings necessary for an order directing the receipt of evidence under the sixth sentence—namely, that the evidence is material and that there was a good cause for petitioner's failure to incorporate it in the record at an earlier date. Rather, the remand was a stipulated and final disposition of the case, much like one to which the parties might agree in any civil action.[23]

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[23] Petitioner errs in contending (Br. 31-32) that because the district court did not enter a judgment affirming, modifying, or reversing the Secretary's initial decision on the merits, and because the remand therefore was not a fourth sentence remand of the sort involved in *Finkelstein*, the court must have remanded the case pursuant to the sixth sentence of Section 405(g). Sentences four and six describe the consequences of remand orders entered in two particular types of situations that may arise in a case under 42 U.S.C. 405(g). They do not purport to state an exhaustive list of such situations. Cf. *Finkelstein*, 110 S. Ct. at 2662-2663. As we have explained, the sixth sentence prescribes a special procedure for utilizing the assistance of the agency in cases that remain before the district court. That is not what the district court did here; it finally disposed of the case, exercising its inherent authority

Furthermore, in light of the purposes of the sixth and seventh sentences (to assist the court in adjudication of a case over which it has retained jurisdiction), an order remanding a case to the Secretary for further proceedings ordinarily should be presumed not to have been entered pursuant to the sixth sentence unless the district court explicitly states otherwise, and therefore explicitly retains jurisdiction to rule on the merits. Cf. *Michigan* v. *Long*, 463 U.S. 1032, 1037-1044 (1983). That rule of construction would greatly simplify litigation in this area, especially since many remand orders, like the one in this case, are brief and are drafted without specific reference to particular provisions of Section 405(g). Such a rule of construction would also recognize modern realities, in which the Secretary finds the claimant disabled in a high percentage of cases after remand (thereby making it pointless for the court to reassume jurisdiction over the case), see note 13, *supra*, and in which the press of judicial business weighs against unnecessary adjudications by the courts following a remand. And such a rule would, in our view, comport with the usual expectations of the parties and the district court, all of whom typically intend the Secretary to assume full responsibility for any further adjudication.[24]

(independent of both sentences four and six) to remand the case to the Secretary "for all further proceedings." J.A. 11.

[24] There is much to commend the Ninth Circuit's approach even in a case remanded to the Secretary pursuant to the sixth sentence of Section 405(g). Sentences six and seven obviously were designed for situations in which a dispute regarding the claimant's eligibility remains after the proceedings before the Secretary are completed. Where the Secretary, after remand, renders a decision to which the claimant does not object, there is little point in filing the decision and transcript of proceedings with the district court or in requiring further action by the district court as a precondition to the filing of a fee application; in fact, the claimant's failure to object to the post-remand decision removes any basis for a continuing case or controversy in court. See *Richard* v. *Sullivan*, slip op. 6. Following the Ninth Circuit's approach in that setting also would have the virtue of uniformity, thereby eliminating the

C. The Fourth Circuit's Decision In *Guthrie v. Schweiker* And Cases Following It Do Not Warrant Rejection Of The Ninth Circuit's Approach In This Case

1. Despite the compelling support for the decision below in 42 U.S.C. 405(g), in EAJA, and in this Court's decisions in *Hudson* and *Finkelstein*, petitioner contends (Br. 16-20) that the Court should follow the approach suggested by *Guthrie* v. *Schweiker*, 718 F.2d 104 (4th Cir. 1983); *Brown* v. *Secretary of HHS*, 747 F.2d 878, 884-885 (3d Cir. 1984); and *Taylor* v. *Heckler*, 778 F.2d 674, 677 (11th Cir. 1985). All of those decisions, however, were rendered prior to *Hudson* and *Finkelstein* and rest on a seriously flawed view of the procedures for adjudication of Social Security claims.

The Fourth Circuit in *Guthrie* relied on three premises in holding that the Secretary should file his new decision on remand with the district court, that the district court should then enter a judgment on the basis of that decision, and that the district court judgment would trigger the 30-day period for filing a fee application under EAJA. Each of those premises has since been shown to be erroneous. First, the Fourth Circuit believed, contrary to the subsequent decision in *Finkelstein*, that a remand order cannot be a final decision that terminates proceedings in the district court and that is subject to immediate appeal. 718 F.2d at 106. Second, in concluding that the Appeals Council decision on remand cannot be a "final judgment" that commences the 30-day period for filing an EAJA application, the Fourth Circuit relied on its view that "EAJA draws a clear distinction between final administrative actions and final judicial actions," *Ibid.*

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need to distinguish between different kinds of remands in construing sometimes ambiguous district court orders. This case, however, presents no occasion for determining whether the 30-day limitations period for filing an EAJA application might, in appropriate circumstances, commence with the rendering of an administrative decision following a remand under the sixth sentence of Section 405(g), or whether the Secretary could promulgate new procedures providing for such treatment of sentence six remands.

(comparing 5 U.S.C. 504(a)(2) with 28 U.S.C. 2412 (d)(1)(B)). That rationale is inconsistent with the subsequent decision in *Hudson*, where the Court rejected the Secretary's similar argument (likewise based on a comparison between 5 U.S.C. 504 and 28 U.S.C. 2412) that the administrative proceedings on remand are wholly distinct from the "civil action" for purposes of EAJA. 490 U.S. 890-892. Third, as noted above, *Guthrie* expressly relied on the language in the sixth sentence of Section 405(g) requiring the Secretary to file his new decision on remand with the district court (718 F.2d at 106); *Finkelstein* held, contrary to the Fourth Circuit's apparent belief, that this provision applies *only* to sixth sentence remands. 110 S. Ct. at 2664.[25]

In *Brown*, the Third Circuit, citing *Guthrie* and likewise relying on the sixth sentence of Section 405(g), stated in dictum that at least where the claimant requests the district court at the time of remand to retain jurisdiction to award fees (which petitioner did not do here), the Secretary should file his new decision on remand with the district court and the district court may then affirm, modify, or reverse that decision; the district court's order in turn could constitute the requisite "final judgment" triggering the 30-day EAJA filing period. 747 F.2d at 884-885. This analysis, like that in *Guthrie*, does not survive *Finkelstein*.[26]

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[25] Moreover, as the Court indicated in *Finkelstein*, *Guthrie* itself may have involved a sixth-sentence remand. 110 S. Ct. at 2666 n.8.

[26] In *Brown*, the roles of the Secretary and the claimant were reversed: citing the sixth sentence of Section 405(g), the Secretary represented that he would in all cases file the post-remand decision with the district court, which could then enter an order that would constitute the "final judgment" for EAJA purposes; and the claimant argued that Section 405(g) required such a procedure only in the limited category of cases covered by sentence six of Section 405(g). 747 F.2d at 884. With the case in this posture, the Third Circuit did not independently conclude that Section 405(g) required such filings; it deferred to the Secretary's representation. See *Buck* v. *Secretary of HHS*, slip op. 10 n.5. *Finkelstein* of course has eliminated any basis for the notion that the Secretary is legally

In *Taylor*, the claimant moved to dismiss the action in court after he prevailed before the Secretary on remand, and the district court granted that motion. The Eleventh Circuit held that the EAJA filing period commenced with the order of dismissal, reasoning that a district court order remanding a case to the Secretary is not a final judgment subject to immediate appeal; that because the remand order is interlocutory, the district court retains jurisdiction during administrative proceedings on remand; that the district court therefore must enter an order at a later date to terminate its jurisdiction; and that such an order is the "final judgment" that commences the 30-day limitations period for filing an EAJA application. 778 F.2d at 677-678 & n.2. The essential premise in this chain of reasoning—that a remand order is not appealable—was later held erroneous in *Finkelstein*.

In short, all of the decisions on which petitioner relies rest on premises since shown by *Hudson* and *Finkelstein* to have been erroneous.[27] The Court therefore should follow the post-*Hudson* and *Finkelstein* rulings exemplified by the decision below.

2. For similar reasons, petitioner's reliance (Br. 23) on the reference to *Guthrie* in the House Report on the 1985 amendments to EAJA is misplaced. See H.R. Rep. No. 120, *supra*, at 19-20. That reference was in a part of the Report that discussed Section 3 of the 1985 amendments, 28 U.S.C. 2412 note, and that addressed the interaction of EAJA and the special provision in the Social Security Act, 42 U.S.C. 406(b), for payment of attorney's fees out of the claimant's past-due benefits. As part of the background for that discussion, the Report described how some courts had resolved EAJA issues in the Social Security context. The Report noted that a claimant ordinarily had not been regarded as a "prevail-

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required to make post-remand filings with the district courts. (The form appended to petitioner's brief, which states that the papers will be furnished to the U.S. Attorney for filing (Pet. Br. App. 2a), was developed prior to *Finkelstein*.)

For similar reasons, petitioner's quotation (Br. 29-30, 44-45) of statements in our briefs in *Hudson* and *Finkelstein* that it would be appropriate for the Secretary to file the post-remand decision of the Secretary with the district court, in order to facilitate the award of EAJA fees, is not a basis for concluding here that the Secretary is *required* to follow that practice. As explained in the text, we believe that such a practice creates unnecessary delay and paperwork. In light of *Finkelstein*, if the Court affirms the Ninth Circuit's decision in this case, the Secretary does not propose to continue the practice of making such post-remand filings as a general matter.

[27] In *Myers* v. *Sullivan*, 916 F.2d 659 (11th Cir. 1990) (see Pet. Br. 25, 32-33), which was a consolidated opinion rendered in four individual cases, the Secretary's decision on remand in fact was filed with the district court, and the district court then entered an order disposing of the case. The court of appeals held that, even though the district court in each case sustained the Secretary's decision on remand (and even though the Secretary therefore would be unlikely to appeal such an order), the orders did not become "final judgments" that commenced the 30-day period for filing an EAJA application until there was some affirmative indication that the Secretary would not appeal. In the court's view, that ordinarily would be only after the 60-day period for filing a notice of appeal under Fed. R. Civ. P. 4 had expired, unless there was some earlier, definitive statement by the Secretary disavowing appeal. 916 F.2d at 671-672.

Because the administrative decisions on remand in *Myers* had been filed with the district court and the district court then entered an order disposing of each case, the Eleventh Circuit had no occasion to consider whether the Secretary's fully favorable decision on remand would have qualified as a "final judgment." The Eleventh Circuit did, however, describe the practice under *Guthrie*, *Brown* and its own decision in *Taylor* as reflecting rules that, "[u]ntil recently," had governed Social Security cases. 916 F.2d at 672-673. Especially in light of the belief expressed elsewhere in the *Myers* opinion that *Finkelstein* had worked a substantial change in governing principles (*id.* at 677-678; but see page 48, *infra*), the implication of the Eleventh Circuit's observation is that the rules of *Guthrie*, *Brown* and *Taylor* no longer obtain. The court also stressed that the term "final judgment" is not to be given a rigid, overly technical interpretation. *Id.* at 670-671.

ing party" solely by virtue of obtaining a remand to the Secretary. *Id.* at 19. It then stated that *Guthrie* had "pointed to the provision of 42 U.S.C. 405(g) providing that after the HHS review upon remand the agency must file its findings with the reviewing court." *Ibid.* The Report continued: "Thus the remand decision is not a 'final judgment,' nor is the agency decision after remand"; "[i]nstead, the District Court should enter an order affirming, modifying or reversing the final HHS decision, and this will usually be the final judgment that starts the 30 days running." *Ibid.*

As the Court noted in *Finkelstein* (110 S. Ct. at 2665-2666 n.8), this 1985 Report on EAJA sheds no light on the interpretation of Section 405(g) as originally enacted in 1939, and its discussion of the procedures required by Section 405(g) was mistaken. The Report therefore sheds little light on whether, once those essential but mistaken premises are put to one side, the Secretary's decision on remand may properly be regarded as the "final judgment" for puprposes of commencing the 30-day limitations period for seeking EAJA fees—especially in view of the subsequent holdings in *Hudson* (that the proceedings on remand are part of the civil action for purposes of EAJA), and in *Finkelstein* (that a remand order terminates the proceedings in the district court).[28]

D. The Approach We Propose Is More Practical, And More Helpful To Claimants, Than Any Suggested Alternative

Petitioner contends (Br. 33-40) that the construction of the EAJA we propose would be "utterly unworkable." Petitioner is simply wrong. The courts of appeals that have examined the question after *Hudson* and *Finkelstein* have concluded that this rule makes the most prac-

[28] Moreover, as we have explained (see pages 20-22, *supra*), our submission is also supported by other aspects of the legislative history of the 1985 amendments.

tical sense. We think that is especially so if, as we suggest (see pages 35-38, *infra*), the 30-day filing period uniformly begins to run at the end of the time during which the claimant could have sought further review under applicable statutory and regulatory provisions.

As we have explained, this approach has a number of practical virtues. First, it commences the 30-day limitations period at the time when the proceedings *are* over as a practical matter. Second, it properly places the burden on the person seeking further relief—the claimant—to take the initiative by filing an application for attorney's fees. Third, it saves the Secretary the burden of filing anything further in court, and saves the court the burden of receiving and acting upon such filings, in those cases in which the claimant may never seek attorney's fees. Fourth, it makes attorney's fees promptly available by allowing the claimant to seek them on his own initiative. Under the rule petitioner proposes, by contrast, the district court could do nothing unless and until there had been a filing with the court of the decision on remand and the court had entered some sort of (superfluous) order on the merits.

Petitioner's practical objections to our proposed approach are without merit.

1. As an initial matter, a number of petitioner's objections are tied to one aspect of the Ninth Circuit's analysis in this case with which, on reflection, we disagree. The narrow area of our disagreement with the Ninth Circuit, however, does not in any way undermine the correctness of the judgment below.

In our view, a post-remand decision of the Secretary should be deemed "final and not appealable," for purposes of EAJA, when the time for seeking review of that decision has expired. That should be so, we believe, whether the post-remand decision is regarded as fully favorable to the claimant (as the Appeals Council's May 7, 1985, decision clearly was in this case), or only partially favorable to the claimant (as would be true, for example, if the post-remand decision in this case had

found the claimant to be disabled for only part of the period covered by his application), or indeed not favorable at all. The court of appeals seemed to agree that as a general rule, an administrative decision is not final and unreviewable until after the time for seeking review of that decision has expired. But it carved out an exception to that general rule for this and like cases, on the ground that where the post-remand decision is fully favorable, the claimant would have no reason to seek further review. See J.A. 32-33.

As we read the definition of the term "final judgment" in 28 U.S.C. 2412(d)(2)(G), whether a particular decision is "final and not appealable" should turn solely on whether the time within which to appeal the particular order has expired, not on whether the claimant might have an interest or stake in appealing the order. Although the phrase "not appealable," standing alone, might carry either connotation, when it is coupled with the term "final," the sense of paragraph (G) as a whole is that it defines a "final judgment" in temporal (not standing) terms. That interpretation also is consistent with the purpose of the definition of "final judgment," which is to identify the *time* within which an application for fees must be filed.

Moreover, this construction of paragraph (G) is confirmed by its legislative history. Paragraph (G) was added to 28 U.S.C. 2412(d)(2) in 1985 to resolve a conflict in the lower courts on the question whether a "judgment" was to be regarded as "final" for EAJA purposes when it was entered, or only when the period for taking an appeal from that judgment had lapsed. See pages 20-22, *supra*. Paragraph (G) was expressly intended to ratify and codify the latter approach. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 14 (1985) (amendments adopt interpretation that judgment is final "when the time to appeal has run"); *id.* at 18 n.26 ("if the Government does not appeal an adverse decision, the thirty-day period would begin to run upon expiration of the time for filing a notice of appeal or a

petition for certiorari");[29] *id.* Pet. II, at 6 & n.26 (same); S. Rep. No. 586, 98th Cong., 2d Sess. 16 (1984) (fee petition must be filed within 30 days of "when a party's right to appeal the order has lapsed"). This construction of the term "final judgment" (as defined in paragraph (G)) also makes practical sense. It results in a uniform, easily applied rule for all administrative and judicial orders—a rule that requires reference only to the time limits for seeking further review under the particular statutory and regulatory scheme. By the same token, this construction avoids the need for post hoc evaluation of a particular order to determine whether a claimant could have sought review or would have had any interest in doing so.

Thus, in the present context, a post-remand decision by the Secretary that the claimant allows to become "final and not appealable" by failing to seek further administrative or judicial review within the allotted time is the "final judgment" in the action for purposes of triggering the 30-day limitations period under EAJA. In the paritcular circumstances of this case, the difference between the foregoing rule and the one adopted by the Ninth Circuit does not affect the outcome. Since petitioner never sought judicial review of the Appeals Council's May 7, 1985, post-remand decision, that decision became "final and not appealable" for purposes of EAJA 65 days later (on July 11, 1985). Petitioner then had 30 days (until August 10, 1985) within which to file an EAJA application. But petitioner did not file his EAJA application until May 16, 1986. That was over nine months late. Accordingly, under the rule we propose, as well as under the exception to that rule fashioned by the Ninth Circuit for cases such as this,

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[29] The House Report stated (at 18 n.26) in a closely analogous context: "In a case remanded by a court of appeals for entry of judgment, the time deadlines would commence on expiration of the time for appealing the judgment on remand."

the judgment below ordering dismissal of petitioner's EAJA application as untimely is correct.[30]

2. Against this background, each of petitioner's supposed "practical" objections is insubstantial.

a. Petitioner first argues (Pet. 34-38) that the decision below would "create havoc" in cases in which the claimant seeks attorney's fees from the United States under EAJA and also seeks, under 42 U.S.C. 406(b), to have the court allow an attorney's fee not exceeding

[30] At the time of the post-remand administrative proceedings in this case, governing regulations provided that a case remanded by a district court would remain within the jurisdiction of the Appeals Council. If an evidentiary hearing was required, or if circumstances otherwise warranted, the Appeals Council could refer the case to an ALJ to conduct further proceedings and make a recommended decision. The Appeals Council, however, would render the Secretary's decision on remand. See 20 C.F.R. 404.983 (1985) (Title II); *id.* 416.1483 (SSI). If the claimant was dissatisfied with the Appeals Council decision, he could then could return to court to challenge it.

In September 1989, the Secretary published new regulations adopting different procedures for cases remanded by a district court. 54 Fed. Reg. 37,789. Under the revised procedures, the Appeals Council will ordinarily remand such a case to an ALJ, who can render his own decision rather than preparing a recommended decision for the Appeals Council. The claimant then may file exceptions to the ALJ's decision with the Appeals Council within 30 days, and the Appeals Council may assume jurisdiction on its own motion within 60 days. 20 C.F.R. 404.983 and 404.984, 416.1483 and 416.1484. If the Appeals Council takes jurisdiction (on the basis of exceptions or on its own motion), the Appeals Council's new decision "becomes the final decision of the Secretary after remand." 20 C.F.R. 404.984(b)(3), 416.1484(b)(3). If the claimant does not file exceptions within 30 days and the Appeals Council does not assume jurisdiction within 60 days, the decision of the ALJ "becomes the final decision of the Secretary after remand." 20 C.F.R. 404.984(d), 416.1484(d). *Finkelstein* makes clear that the Secretary's final post-remand decision is then reviewable "in a separate piece of litigation," 110 S. Ct. at 2663, pursuant, once again, to 42 U.S.C. 405(g). Thus, by virtue of the 60-day limitation on judicial review under Section 405(g), the claimant would have 60 days within which to seek judicial review of whatever decision is, under these regulations, "the final decision of the Secretary after remand."

25% of (and to be paid out of) the "past-due benefits to which the claimant is entitled by reason of such judgment." This contention is without merit for several reasons.

As an initial matter, as petitioner elsewhere concedes (Br. 47), Section 406(b) applies only in Title II cases. It therefore is inapplicable to this case, which arises solely under the SSI program established by Title XVI of the Act. See *Bowen* v. *Galbreath*, 485 U.S. 74 (1988). Moreover, even in cases arising under Title II, there is no inconsistency. Contrary to petitioner's assertion (Br. 36), Section 406(b) has not been construed to require the district court either to award attorney's fees as part of the judgment itself, or to enter a "judgment" following completion of administrative proceedings on remand as a prerequisite to entertaining an application for fees for services performed by the attorney in court prior to the remand.[31] Accordingly, the established practice under Section 406(b) in fact strongly supports our position that entry of a subsequent "judgment" by the district

[31] Numerous appellate decisions have addressed the availability of fees under 42 U.S.C. 406(b) where no such steps were taken. See, *e.g.*, *Gardner* v. *Melendez*, 373 F.2d 488, 490 (1st Cir. 1967); *Rodriguez* v. *Secretary of HHS*, 856 F.2d 338, 339 (1st Cir. 1988); *Conner* v. *Gardner*, 381 F.2d 497 (4th Cir. 1967); *Ray* v. *Gardner*, 387 F.2d 162 (4th Cir. 1967); *Brown* v. *Gardner*, 387 F.2d 345 (4th Cir. 1967); *Morris* v. *SSA*, 689 F.2d 495 (4th Cir. 1982); *Whitehead* v. *Richardson*, 446 F.2d 126, 128 (6th Cir. 1971); *Webb* v. *Richardson*, 472 F.2d 529, 534-535 (6th Cir. 1972); *Jankovich* v. *Bowen*, 868 F.2d 867, 869 (6th Cir. 1989); *Smith* v. *Bowen*, 815 F.2d 1152 (7th Cir. 1987); *Fenix* v. *Finch*, 436 F.2d 831, 834-835 (8th Cir. 1971); *Burnett* v. *Heckler*, 756 F.2d 621, 624 (8th Cir. 1985); *MacDonald* v. *Weinberger*, 512 F.2d 144, 145-146 (9th Cir. 1975); *Straw* v. *Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989); see also R. Francis, *Social Security Disability Claims: Practice & Procedure* § 5.22, at 25 (1983) (stating that fee petition must be filed with court if claimant prevails on remand, without mentioning any requirement of a new judgment); J. Glenn, *et al.*, *Social Security: Law & Practice* § 49.7, at 13 (1983 & Supp. 1990) (remand order is favorable judgment permitting award of fees, at least where claimant receives subsequent award by the Secretary).

court likewise is not required by Section 405(g) or EAJA. In addition, experience shows that the filing and review of fee applications under EAJA and Section 406(b) can and has been closely coordinated in practice. See R. Francis, *Social Security Disability Claims: Practice and Procedure* § 5:34, at 39-40 (1983 & Supp. 1990); Note, 58 Ford. L. Rev. at 1285-1286; *Jankovich* v. *Bowen*, 868 F.2d 867 (6th Cir. 1989). Indeed, Section 3 of the 1985 EAJA amendments, 28 U.S.C. 2412 note, expressly contemplates that result, since it requires an offset of the two awards to prevent a double recovery.

b. Petitioner next complains (Br. 38) that, under the Ninth Circuit's reasoning, "EAJA petitions will have to be filed before all the work on the case is completed." Petitioner points out that after the claimant is found to be disabled, SSA then must determine whether the claimant satisfies the non-disability eligibility requirements and, if so, the amount (if any) of benefits to which the claimant is entitled. Petitioner contends that any work a lawyer performs in this process following a court remand is compensable under EAJA because it is " 'necessary . . . to the ultimate vindication of the claimant's rights' " (Br. 38 (quoting *Sullivan* v. *Hudson*, 490 U.S. at 890)), but that if an administrative decision that has become final and not appealable triggers the running of the 30-day limitations period for filing an EAJA application, a lawyer might have to file his EAJA application before that work is completed. As a consequence, the lawyer would be required either to forgo fees for that additional work or to amend his prior EAJA application.

There are several significant problems with this analysis. First, the determination of the amount (if any) of SSI benefits to which a claimant is entitled is separate from the determination of whether the claimant is disabled. It is therefore separately subject to review under the multi-step administrative appeals process in 20 C.F.R. Pt. 416, Subpt. N (reconsideration, ALJ hearing, and Appeals Council review) that was available to the claimant to challenge the determination that he was not

disabled (see 20 C.F.R. 416.1401, 416.1402(a) and (j); see also 20 C.F.R. 404.901, 404.902(a) and (c) (similar provisions under Title II program))—and, if necessary, to judicial review under 42 U.S.C. 405(g).[32] Accordingly, issues concerning benefit amounts and payment are distinct from the issues that were before the court in the civil action for judicial review of the Secretary's decision finding the claimant not disabled. See Note, 58 Ford. L. Rev. at 1282-1283. Thus, an attorney's work on those issues is not necessary to the vindication of the rights addressed by the district court's decision on the question of disability, and the rationale of *Hudson* does not extend to such services.

Second, even if such services were compensable under EAJA, the approach we suggest would not cause substantial difficulties. Contrary to petitioner's view, the computation of benefits will in many cases be completed within 30 days of the favorable decision—or, at least, all necessary work by the attorney in that process will have been completed within that period.[33] Moreover, this objection by petitioner (like most of his others) rests on the premise that an administrative decision that is fully favorable to the claimant is, upon issuance, a "final judgment" that triggers the running of the 30-day limitations period. Under the approach we propose, however, the 30-day EAJA period does not begin to run until after expiration of the 60-day period for seeking further review. As a result, there will be at least 90 days before the EAJA application must be filed. Presumably, the

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[32] In this case, petitioner did not seek further administrative review or judicial review of the initial determination of the amount of benefits to which he was found to be entitled under his first application, J.A. 25-26, and that determination therefore became final and binding. See 20 C.F.R. 416.1405.

[33] As petitioner points out (Br. 36 n.8), the standard notice to claimants states that ordinarily the amount of benefits will be resolved within 60 days of the date the decision is rendered. See Pet. Br. App. 1a.

computation of the amount of benefits would be completed within that period in virtually all cases.[34]

Finally, even if an attorney's work in the computation-of-benefits process were covered by EAJA after a remand on the issue of disability—and even if a rare case arose in which the attorney's work in that process were not completed within 90 days—we see no reason why the claimant could not file his EAJA application and then amend it when the computation process was completed.

c. Petitioner contends (Br. 38-39) that the administrative review process is a "highly informal one" in which it "is often difficult, if not impossible, to flag the finality of a decision for EAJA purposes." This assertion is without merit. Under the rule we propose, the post-remand decision of the Secretary becomes "final and not appealable" if the claimant does not seek further administrative or judicial review within the time allowed by the governing statute and regulations. The claimant then knows that to avoid such finality, he must seek further review.[35]

d. Petitioner contends (Br. 39-40) that the claimant, not the Secretary, is the one to decide whether an administrative decision on remand is fully favorable. We agree, and the approach we propose accommodates that point. If the claimant does not believe the decision is fully favorable, he may seek further review within the available time. Once the claimant has elected to forgo his right to seek further review, the EAJA limitations period commences.

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[34] We have been informed by the Department of Health and Human Services that in fiscal year 1990, the average time required for the computation of benefits in Title II cases was 24 days. The Department does not have comparable statistics concerning SSI cases. Those cases might take longer to determine.

[35] The affidavits attached to petitioner's rehearing petition in the court of appeals, cited by petitioner (Br. 39), recounted three attorneys' experience in the limited context of whether attorneys receive copies of award certificates. As we have explained (see pages 40-41, *supra*), the award and payment process is distinct from the adjudication of disability.

e. Petitioner's contention (Br. 40) that the judgment below should be reversed to prevent other agencies from adopting similar principles governing the finality of their decisions on remand is wholly without merit. Contrary to petitioner's implicit suggestion, it is a virtue of the decision below that it provides for finality at the completion of the post-remand administrative process for purposes of *both* EAJA and the merits. Under the approach we urge, in other words, a post-remand decision will be deemed a final judgment for EAJA purposes only when it has become final and not appealable on the merits, under the statutory and regulatory provisions that govern administrative and judicial review under the particular program at issue. There will be, accordingly, a readily available benchmark under each program for determining when the 30-day limitations period for filing an EAJA application begins to run.

II. THERE ARE NO GROUNDS FOR THIS COURT TO EXEMPT PETITIONER FROM THE REQUIREMENT THAT AN EAJA APPLICATION BE FILED WITHIN 30 DAYS OF A POST-REMAND DECISION BY THE SECRETARY THAT HAS BECOME FINAL AND NOT APPEALABLE

Petitioner contends (Br. 40-48) that if the Court upholds the Ninth Circuit's ruling, "it should not be applied retroactively" (Br. 40) to render his EAJA application untimely. There are several problems with this argument.

First, the Ninth Circuit's ruling on the question of when an EAJA application must be filed was rendered in this very case, and now petitioner has asked this Court to do the same thing. If the Court rejects petitioner's argument and agrees with our submission, it necessarily will hold that the EAJA application filed by petitioner in this case was untimely. Thus, this is not a typical case presenting a question of the "retroactive" application of a judicial decision, and the circumstances would not in any event excuse petitioner's nine-month

delay in applying for fees. Whether the Ninth Circuit's (or this Court's) ruling here should be applied to *other* cases now pending in the Ninth Circuit (or other circuits) in which the Secretary's post-remand decision became final and unreviewable before the date of the Ninth Circuit's (or this Court's) ruling is a question that may properly be left to the lower courts in the first instance.[36] That is especially so since the Ninth Circuit did not address the question of retroactivity in the decision below, and since no court of appeals has addressed the impact of this Court's intervening decision in *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453 (1990), discussed below, in this setting. For these reasons, and because the retroactivity question might turn in large measure on whether there was controlling precedent in a particular circuit, the Court may wish to have that question in this case considered by the Ninth Circuit in the first instance.

Furthermore, as petitioner concedes, a court may not in any event decline to give retroactive effect to a jurisdictional ruling. See Br. 41 (citing *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379-380 (1981)). The Ninth Circuit in this case held that the 30-day filing period under 28 U.S.C. 2412(d)(2)(B) is jurisdictional. J.A. 29-30 (citing *Papazian* v. *Bowen*, 856 F.2d 1455, 1455-1456 (9th Cir. 1988), and *Barry* v. *Bowen*, 825 F.2d 1324, 1327-1329 (9th Cir. 1987)). Other courts of appeals have reached the same conclusion.[37]

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[36] Several such cases are now pending on appeal in the Ninth Circuit, but the appeals have been stayed pending the Court's decision in this case.

[37] *American Ass'n of Retired Persons* v. *EEOC*, 873 F.2d 402, n.7 (D.C. Cir. 1989); *Dunn* v. *United States*, 775 F.2d 99, 103 (3d Cir. 1985); *Allen* v. *Secretary of HHS*, 781 F.2d 92, 94 (6th Cir. 1986); *Jabbay* v. *Sullivan*, 920 F.2d 472, 473 (7th Cir. 1990); *Olson* v. *Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Myers* v. *Sullivan*, 916 F.2d 659, 666 (11th Cir. 1990); *United States* v. *J.H.T. Inc.*, 872 F.2d 373, 375 (11th Cir. 1989); *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, 1494 (11th Cir. 1986); *Beta Systems, Inc.* v. *United States*, 866 F.2d 1404, 1405 (Fed. Cir. 1989); *J.M.T. Mach. Co.* v. *United States*, 826 F.2d 1042, 1046-1047 (Fed. Cir. 1987); see also cases cited in note 40, *infra*; cf. *Howitt* v. *U.S. Dep't of Commerce*, 897 F.2d 583, 584 (1st Cir. 1990) (5 U.S.C. 504(c)(2)); *Long Island Radio Co.* v. *NLRB*, 841 F.2d 474, 477-478 (2d Cir. 1988) (5 U.S.C. 504(a)(2)); see generally Note, 58 Ford. L. Rev. at 1273 & n.27.

Petitioner contends (Br. 41-42) that under *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453 (1990), the 30-day filing period should now not be regarded as jurisdictional in nature—even though petitioner apparently concedes (Br. 41) that it *was* so regarded at the time of the events giving rise to these proceedings on petitioner's fee application. In *Irwin*, the Court held that 42 U.S.C. 2000e-16(c), which allows a federal employee to file a Title VII action in district court within 30 days of the administrative decision, is not jurisdictional, but rather is subject to equitable tolling in appropriate circumstances. 111 S. Ct. at 456-457. The Court recognized that it previously had construed the six-year limitations period under 28 U.S.C. 2501 (applicable to suits in the then-Court of Claims) as stating a jurisdictional bar to suits not filed within that period. 111 S. Ct. at 457 (citing *Soriano* v. *United States*, 352 U.S. 270, 273 (1957)). But the Court in *Irwin* chose to state a "more general rule" that once Congress has waived the Government's sovereign immunity, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 111 S. Ct. at 457. Thus, contrary to petitioner's suggestion (Br. 41-42), the Court stated only a rebuttable presumption, not an absolute rule applicable to all statutes prescribing time limits for filing suits against the Government.[38]

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[38] The Court did not expressly overrule *Soriano*, although it said that it was not persuaded that the difference between the language of 28 U.S.C. 2501, at issue there, and 42 U.S.C. 2000e-16(c) was enough to manifest a different congressional intent with respect to the availability of equitable tolling. 111 S. Ct. at 457; but see *id.* at 549 (White, J., dissenting) (stating that the Court "directly overrules" *Soriano*).

Here, the text of 28 U.S.C. 2412(d)(1)(B) is written in mandatory terms (a party "shall" file an application within 30 days of judgment), and the legislative history of EAJA shows that the 30-day filing period was understood to be jurisdictional in nature. For example, the Senate Report on the bill ultimately enacted as the 1985 EAJA amendments explained that the issue of when a "judgment" is deemed "final" under 28 U.S.C. 2412(d)(2)(B) "is important since the thirty-day deadline for filing the fee application is jurisdictional and cannot be waived." S. Rep. No. 856, *supra*, at 16;[39] cf. H.R. Rep. No. 120, *supra*, at 7 (issue important because fee petitions "must be filed" within 30 days); H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 26 (1980) (EAJA "requires" filing within 30 days) H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980) (party "must apply" within 30 days). See generally *Action on Smoking & Health* v. *CAB*, 724 F.2d 211, 225-226 (D.C. Cir. 1984). Furthermore, when Congress amended EAJA in 1985, a

[39] See also *Equal Access to Justice Act Amendments: Hearing on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 38 (1984) (Dep'ty Ass't Att'y Gen'l Kuhl) (when "final judgment" occurs is important because the "thirty-day deadline for filing the application is jurisdictional and cannot be waived"); *Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 32 (1983) (statement of Ass't Att'y Gen'l McGrath) ("thirty-day deadline for filing the application is jurisdictional and cannot be waived by the government or even the court"); *id.* at 75 (quoting Small Business Legal Defense Committee & D. Stewart, "The Equal Access to Justice Act: An Attorney's Handbook") ("it has been held that the 30-day requirement from time of final judgment is jurisdictional and may not be waived"); *Implementation of the Equal Access to Justice Act: Oversight Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 3, 5 (1982) (Ass't Att'y Gen'l McGrath ("jurisdictional and cannot be waived"); *Equal Access to Justice: Hearing Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 14 (1987) (same).

number of courts of appeals had already held that its filing periods are jurisdictional,[40] which reinforces the specific support for that rule in the legislative history. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379-382 (1982).

Even if equitable tolling and a prospective-only ruling were not absolutely foreclosed in this context on jurisdictional grounds, there is no warrant for excusing petitioner's delay in this case. The appellate decisions cited by petitioner (Br. 42) as having suggested a contrary rule—the Fourth Circuit's decision in *Guthrie* and the Third Circuit's decision in *Brown*—were not binding on the District Court for the Central District of California. This is therefore not a case, like *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 107 (1971), and *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 608-609 (1987), where the court of appeals overruled established circuit precedent. See also *American Trucking Ass'ns* v. *Smith*, 110 S. Ct. 2323, 2332 (1990) (plurality opinion); compare *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662-663 (1987). Moreover, *Guthrie* and *Brown* were decided before the 1985 amendments to the statutory scheme made it clear that the term "final judgment" for purposes of EAJA departs substantially from its meaning in the specific context of judicial proceedings.[41] In addition, the text of 42 U.S.C. 405(g) furnished adequate notice

[40] See *Action on Smoking & Health* v. *CAB*, 724 F.2d 211, 225 (D.C. Cir. 1984); *Premachametra* v. *Mitts*, 753 F.2d 635, 642 n.10 (8th Cir. 1985) *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985); see also *Monark Boat Co.* v. *NLRB*, 708 F.2d 1322, 1326-1327 (8th Cir. 1983) (5 U.S.C. 504(a)(2)); *Columbia Mfg. Co.* v. *NLRB*, 715 F.2d 1409, 1410 (9th Cir. 1983) (5 U.S.C. 504(c)(2)).

[41] In *Taylor*, the Eleventh Circuit—relying on the explicit terms of 42 U.S.C. 405(g) that this Court later found controlling in *Finkelstein*—questioned an important premise on which *Guthrie*, *Brown* and *Taylor* itself rested: that a remand order is not appealable. 778 F.2d at 676-677; see *Buck* v. *Secretary of HHS*, slip op. 10 n.5. *Taylor* therefore undermined any reliance petitioner might have placed on those decisions.

to petitioner that (in cases not governed by the sixth sentence), the Secretary was not required to file his decision on remand with the district court and the district court was not required to enter a post-remand judgment. And the position accepted by this Court in *Finkelstein*—that remand orders are appealable—had been widely accepted in many previous appellate decisions. See Gov't *Finkelstein* Br. ~~15-17~~. In these circumstances, even acknowledging the existence of some uncertainty, petitioner cannot claim unfair surprise.

Nor would a prospective-only application of the decision below be necessary to effectuate the purposes of EAJA. See *Chevron*, 404 U.S. at 107. The overriding purpose of EAJA is to remove a potential obstacle to obtaining the services of counsel in challenging governmental action. See *Commissioner, INS* v. *Jean*, 110 S. Ct. at 2322 & n.14 (quoting legislative history). When the question presented by this case arises, the claimants have, by definition, obtained the assistance of counsel that EAJA was intended to promote. A prospective ruling that excused certain existing claimants and their counsel from considerable delay in filing a fee application therefore is not necessary to create an incentive for those claimants to obtain counsel.

Finally, retroactivity would not produce substantially unfair results, *Chevron*, 404 U.S. at 107-108, especially in the circumstances of this case. In *Irwin* itself, the Court noted that equitable relief from limitations periods has been confined to situations in which the claimant has "actively pursued his judicial remedies," and has not been extended to situations "where the claimant failed to exercise due diligence in preserving his legal rights." 111 S. Ct. at 457-458. Petitioner would not be eligible for relief under these principles, because he did not file an application for fees for more than a year after the Appeals Council decision. Cf. *White* v. *New Hampshire Dep't of Employment Services*, 455 U.S. 445, 454-455 (1982) (noting that district courts have discretion to deny applications for attorney's fees and costs on

grounds of tardiness).[42] Nor is there any indication that he ever sought to effectuate either a filing with the district court or the entry of an order by the district court on the merits—the events that he now claims were necessary to enable the district court to award fees. In fact, even when petitioner eventually did file a fee application, he did not request the district court to enter an order affirming the Secretary's post-remand decision. As a result, there is no indication that petitioner in fact relied on the applicability of the procedural requirements he now urges,[43] and therefore no indication that the decision below has worked any hardship at all.[44]

* * * * *

EAJA is only a little more than ten years old. Especially in its early years, before *Hudson* and *Finkelstein*, there was uncertainty on the part of both claimants and the Secretary about how the statute worked, and how it

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[42] In addition, the district court, which addressed the merits of petitioner's fee application, held (correctly in our view) that petitioner is not entitled to EAJA fees in any event because the government's position was substantially justified. J.A. 19-21.

[43] Petitioner points out (Br. 43) that the form sent to the U.S. Attorney after the Appeals Council decision stated: "If appropriate, have the action discontinued or dismissed." J.A. 17-18. The form of course did not state that dismissal *was* appropriate in this case. Nor did it state that dismissal by the court was a prerequisite to commencing the 30-day filing period under EAJA.

[44] Although, for the reasons stated in the text, there is no basis for application of a judicially fashioned rule of nonretroactivity to petitioner's case, a claimant who has an EAJA application pending in court that is out of time under the position we urge could seek administrative relief by filing an application to extend the period for filing an action for judicial review of the Secretary's post-remand decision under 42 U.S.C. 405(g). Section 405(g) and implementing regulations permit such extensions for "good cause" shown, even after the 60-day period has elapsed. 20 C.F.R. 404.911, 404.982, 416.1411, 416.1482. If such an extension were granted, the post-remand decision would not be a "final judgment" within the meaning of EAJA until the time for appeal had expired, and the claimant would then have an opportunity to file a timely EAJA application.

meshed with the review provisions of the Social Security Act. The *Hudson* and *Finkelstein* decisions have eliminated much of the uncertainty. This case presents an opportunity to clarify a remaining question in a way that is consistent with the governing statutes and with those decisions, and that will prove beneficial to all concerned.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 90-5538

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Supreme Court of the United States
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v.
LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE LANGUAGE, HISTORY, AND PURPOSES OF THE EQUAL ACCESS TO JUSTICE ACT MANDATE THAT THE THIRTY-DAY PERIOD FOR FILING A FEE PETITION COMMENCES ONLY AFTER THE ENTRY OF A COURT JUDGMENT.

A. A Judgment Is Not a Prerequisite to an Award of Fees.

The central theme of the Secretary's brief is that petitioner would require the Secretary to make a "pointless" post-remand district court filing in every case (Sec'y Br. 13, 14-16, 29 & n.24). The Secretary badly misreads both petitioner's brief and the language of the EAJA.

Petitioner has never argued that the Secretary must file the administrative record or the decision on remand in every case, or that the court is required to enter a

final judgment before considering an EAJA application. All that petitioner contends, and all that the EAJA plainly requires, is that, *in order for the 30-day statute of limitations to commence*, there must exist a final judgment of the district court. In sentence-six cases, since 42 U.S.C. § 405(g) contemplates a final order after the Secretary complies with his post-remand duties, and the court exercises review under sentence seven, there will be a final judgment for statute of limitations purposes. In other cases, if the Secretary wishes to place the claimant under a time constraint, he may simply present a form order of dismissal to the court, to which the claimant would surely consent. As far as the EAJA is concerned, nothing else is required of any party, including the court.[1]

Ordinarily, of course, the attorney, "being hungry to see some cash," will have incentive enough to file for fees as soon as possible. *McDonald v. Schweiker*, 726 F.2d 311, 314 (7th Cir. 1983). In any event, it will be a rare case where the government suffers any hardship when there is delay; to the contrary, it will have the money that ultimately may be payable to a claimant. If a dismissal is deemed important in a particular case, however, "[t]he government can start the time running by moving for such an order." *Tripodi v. Heckler*, 100 F.R.D. 736, 739 (E.D.N.Y. 1984).

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[1] Even if a district court order were required prior to an EAJA fee award, the additional burden would be minimal. *Compare* Sec'y Br. 16. In all cases remanded under sentence six, the Secretary must return to the district court for a post-remand merits review. Furthermore, in Title II cases, where there is always a fee available under 42 U.S.C. § 406(b), a district court judgment is required under the plain terms of that statute. Thus, the only cases in which the issuance of a district court dismissal order might be independently necessary for EAJA purposes, would be in the relatively few pure SSI claims in which the case had been remanded solely under sentence four. *See* Social Security Administration, *Annual Report to the Congress* 29 (April 1990) (in fiscal year 1989, only 16.5% of disability cases filed in federal court were pure SSI claims).

The absence of a requirement of a judgment is strongly supported by the statutory language under which a prevailing party "shall, within thirty days of final judgment in the action," file a fee petition under the EAJA. 28 U.S.C. § 2412(d)(1)(B). It says nothing about a judgment being a prerequisite for fees. *See McDonald*, 726 F.2d at 314 ("the 30-day provision in the Act was meant to establish a deadline, not a starting point") (Posner, J.).

The 1985 legislative history also supports petitioner because it indicates that Congress was concerned about applications being improperly denied as premature. In *Auke Bay Concerned Citizen's Advisory Council v. Marsh*, 755 F.2d 717 (9th Cir. 1985), the prevailing plaintiff had filed a fee application shortly after being awarded a permanent injunction representing full relief on the merits, but before entry of a final judgment, which occurred almost a year later. The court originally held that this filing was premature, believing that there must be a final judgment before a fee application could be entertained, and denied fees altogether because no application was filed after entry of judgment. The House Report reacted to this decision as follows:

> Fee petitions may be filed before "final judgment". . . . The overly technical approach in *Auke Bay* . . . should be avoided.

H.R. Rep. No. 120, Pt. II, 99th Cong., 1st Sess. 6 n.26 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 151, 156 n.26. After the 1985 EAJA amendments, the *Auke Bay* opinion was withdrawn and revised. *Auke Bay Concerned Citizen's Council v. Marsh*, 779 F.2d 1391 (9th Cir. 1986). In doing so, the court recognized that the EAJA merely "establishes a clear date *after which* applications for attorney fees must be rejected as untimely." *Id.* at 1393. The court then held that a fee application is timely where the applicant has prevailed and the application is filed "no more than 30 days after final judgment." *Id.*; *accord Myers v. Sullivan*, 916 F.2d 659, 679 & n.20 (11th Cir. 1990).

Thus, the Secretary's concern that he will have to file the record and secure merits review in every remand case, simply to permit the filing of EAJA petitions, is wholly illusory. Although he assured this Court in *Finkelstein* that he would file all remand decisions with the court to obtain a judgment for EAJA purposes, Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (No. 89-504), an order of dismissal is not required.[2]

B. The Secretary Ignores the Plain Language of the Statute.

As this Court has said on countless occasions, in any case of statutory construction, the " 'starting point is the language of the statute.' " *Dole v. United Steelworkers of America*, 110 S.Ct. 929, 934 (1990) (*quoting Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985)); *see also U.S. v. James*, 478 U.S. 597, 604 (1986); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). Yet, the Secretary first explains why practical considerations counsel in favor of an affirmance, and only then does he address the words chosen by Congress (Sec'y Br. 18-19). While we believe that practical considerations support reversal (*see infra* Part F), such considerations must, of course, comport with the statutory language.

The Secretary offers no evidence that Congress meant to include decisions of administrative agencies when it decided that EAJA applications should be filed "within thirty days of final *judgment* in the action." 28 U.S.C. § 2412(d)(1)(B). In the face of definitions from numerous lay dictionaries and *Black's Law Dictionary* defining "judgment" solely in terms of a court order (Pet. Br. 12-13 & n.2), the Secretary continues to rely on the definition of "judgment" of "[a] leading American dictionary" (Sec'y Br. 18-19; *see* Opp. 8), which is apparently the only source available that, even secondarily, indicates that a "judgment" may be issued by some "other tribunal." The fact that one aberrant source might be supportive of the Secretary's position hardly overrides the "assum[ption] 'that the legislative purpose is expressed by the ordinary meaning of the words used.' " *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (*quoting Richards v. U.S.*, 369 U.S. 1, 9 (1962)).[3]

Moreover, the Secretary does not even address the statutory framework, which strongly buttresses the conclusion that Congress gave the term "judgment" its ordinary legal meaning. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). As we have said (Pet. Br. 14-15), the EAJA uses the term "judgment" on several occasions, and each time the reference is clearly to the action of a federal court. Even if the term were ambiguous in § 2412(d)(1)(B)—which it is not—other uses of that term in the same statute make certain that Congress intended the 30-day filing period to be triggered by the final judgment of a court. *See* 2A *Sutherland Statutory Construction* § 47.16, p. 161 (Sands 4th ed. 1984); *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 157 (1983) (plain meaning of statute controls unless contrary meaning arises elsewhere in regulatory or statutory context).

In addition, we cannot assume that Congres was acting without any purpose when it decided that the EAJA filing deadline for administrative cases under 5 U.S.C. § 504(a)(2) should be 30 days from a "final disposition in the adversary adjudication," but that it should be 30 days from "final *judgment*" in court cases under § 2412

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[2] Even if the EAJA were construed to require a court judgment, the court could enter one which it considers the fee application. *See, e.g., Bradley v. Sec'y of HHS*, 741 F.Supp. 1461, 1464 (D. Idaho 1990); H.R. Rep. No. 99-120, Pt. I, 99th Cong., 1st Sess. 20, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 148 (court need not wait for Secretary to make post-remand filing).

[3] *Black's Law Dictionary* does include an annotation to a 1932 case that refers to a "judgment" as the decision of a court or "other competent tribunal" (Sec'y Br. 19, *quoting Black's Law Dictionary* 842 (6th ed. 1990), but *Black's* definition is framed solely in terms of "an authentic decision of a court of justice . . . ." *Id.* at 841.

(d)(1)(B) (emphasis added). The Secretary's oblique reference (Sec'y Br. 30-31) to *Sullivan v. Hudson*, 490 U.S. 877 (1989), to counter this clear delineation between "judgments" and administrative adjudications, is misguided. *Hudson* held that administrative proceedings on remand in Social Security matters are compensable under § 2412(d), rejecting the Secretary's argument that, because § 504 provides a route for recovery in certain administrative proceedings, it is the only such route. In doing so, the Court adopted the view that "Congress carved the world of EAJA proceedings into 'adversary adjudications' and 'civil actions,'" *Hudson*, 490 U.S. at 892, thus bolstering our argument that Congress' use of the term "judgment" to describe the final word of a court, and "disposition" to do the same in the administrative context was not accidental.

Finally, the Secretary's suggestion that the term "judgment" *could* be used to characterize the decision of an administrative agency is ultimately irrelevant because that term is not employed to describe decisions of administrative agencies in the American legal system. *See* 5 U.S.C. § 551(6), (7) (indicating that all adjudications governed by Administrative Procedure Act culminate in an "order," defined as "the whole or a part of a final disposition . . ."). Not surprisingly, the Secretary has not pointed to a single administrative agency that issues "judgments" of any kind, and, to our knowledge, there are none. Moreover, the Secretary does not refer to any of his administrative decisions as "judgments." *See, e.g.*, 20 C.F.R. §§ 416.1402 ("inital determinations"), 416.1453 ("decisions"), 416.1481 ("decision" or "denial of review"); *see also Warner v. Bowen*, 648 F. Supp. 1409, 1411 (S.D. Fla. 1986); *Alexander v. Heckler*, 612 F. Supp. 272, 274 (D.R.I. 1985) ("a decision of the Social Security Administration is simply not a judgment within the common definition of the term, and as such, cannot logically be construed as a 'final judgment' necessary to trigger the E.A.J.A. filing limitation"). Furthermore, the "decisions" of the Secretary simply do not possess

the essential characteristics of judgments, *i.e.*, they are not enforceable through execution or otherwise, *see* Fed. R. Civ. P. 58, 62(a), nor may they be appealed by both parties, because only the claimant can seek review of the Secretary's administrative decisions. *See* 42 U.S.C. § 405(g) (sentence one). It is thus inconceivable that Congress believed that the Secretary's administrative decisions would constitute "final judgments" under § 2412(d)(1)(B).

C. The Legislative History Fully Supports Petitioner.

The Secretary argues that the 1985 amendment defining "final judgment" as a "judgment that is final and not appealable," 28 U.S.C. § 2412(d)(2)(G), somehow supports a determination that such judgments include administrative decisions. As we have explained (Pet. Br. 21-23), and as the Secretary agrees (Sec'y Br. 20-21), the sole purpose of this amendment was to adopt the position, first espoused by Judge Posner in *McDonald*, 726 F.2d at 313, and urged at Congressional hearings, that a *district court judgment* becomes "final" when it no longer may be appealed, rather than when it is docketed. *See generally Myers*, 916 F.2d 659. This particular statutory revision did not address, let alone change, the accepted definition of "judgment."

The Secretary wholly ignores numerous references in the legislative history to court orders, and *only* court orders, as the events that trigger the EAJA's 30-day statute of limitations (*see* Pet. Br. 22-23). And, most importantly, he is unable to circumvent legislative history expressly stating that, in social security cases, "the agency decision after remand" "is not a 'final judgment'" for EAJA purposes. H.R. Rep. No. 120, Pt. I, *supra* at 19.

Recognizing the importance of this legislative history, the Secretary makes three interrelated, but unavailing attempts to downplay it (Sec'y Br. 33-34). First, he argues that because this critical passage cites *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983), it should be dis-

regarded. As we acknowledged (Pet. Br. 17 n.3), *Guthrie*'s holding that all remand orders are interlocutory and that, therefore, all remands under 42 U.S.C. § 405(g) must return to the district court for further merits review, is only partially viable today in light of *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (1990), which held that cases remanded under sentence four of § 405(g) are final appealable orders under 28 U.S.C. § 1291. This did not upset the *Guthrie* analysis with respect to remands under sentence six of § 405(g), nor did it undermine its central proposition that a court judgment is necessary to trigger the EAJA limitations period, as this Court itself noted. *Finkelstein*, 110 S.Ct. at 2665 n.8.

More fundamentally, regardless of the degree to which *Guthrie* is still viable, this case involves what Congress contemplated in 1985 in revising the EAJA's statute of limitations, not the Secretary's responsibilities under § 405(g), or whether a particular type of order is appealable under § 1291. Therefore, Congress' citation to *Guthrie* is important because *Guthrie*, and hence Congress, expressly adopted the position that administrative decisions cannot constitute final judgments under the EAJA, with a full understanding of the consequences of its actions. A subsequent decision of this Court on the scope of § 1291 obviously did not inform the Congress and, thus, is irrelevant to this case.

This analysis also undercuts the Secretary's objection that petitioner's legislative history has already been rejected in *Finkelstein* (Sec'y Br. 34). Admittedly, *Finkelstein* disregarded this legislative history as evidence of when a district court decision is "final" for § 1291 purposes, because on that question it was "subsequent legislative history," only tangentially related to § 405(g), and thus it could not have shed light on what Congress meant when it enacted § 405(g). *Finkelstein*, 110 S.Ct. at 2665 n.8. But with respect to the EAJA, this was "plain old legislative history," issued contemporaneously with passage of the law, *see id.* at 2667 (Scalia, J., concurring), and it therefore directly con-

firms that Congress required a court judgment to trigger the limitations period. *Id.* at 2665 n.8 ("this part of this particular committee report concerned the proper time period for filing a petition for attorney's fees under EAJA, not appealability").

Finally, the Secretary complains that the significance of this legislative history is diminished because it is contained in the part of the committee report addressing the interaction of the EAJA with the attorney's fee provision of 42 U.S.C. § 406(b). If anything, this placement is supportive of our position because, as we have noted (Pet. Br. 35), the timing of joint EAJA/§ 406(b) petitions is extremely problematic under the Secretary's theory of this case, since § 406(b) plainly requires a district court judgment. Thus, the committee properly addressed timing issues in the context of its discussion of the EAJA/§ 406(b) set off, adopting the very position urged here by petitioner.

D. *Hudson* and *Finkelstein* Lend No Support to Respondent.

In *Sullivan v. Hudson*, 490 U.S. 877 (1989), this Court ruled that administrative proceedings held by the Secretary after remand were so closely related to the proceedings in the district court that work performed on such remands was compensable under the EAJA. In doing so, the Court reasoned that the district court "retain[ed] jurisdiction over the action within the meaning of the EAJA." *Id.* at 887 (quoting the 30-day EAJA filing period and approving *Guthrie*). The Secretary argues that, because remand proceedings are part of the EAJA's "civil action" under *Hudson*, administrative decisions on remand may constitute "final judgments" under the EAJA. But simply because administrative proceedings may be a part of a civil action for fee purposes, says nothing about whether their resolution constitutes a judgment under the EAJA. *See Hudson*, 490 U.S. at 887 (EAJA's civil action ends with court judgment).

Next, the Secretary contends that *Hudson*, when read in conjunction with *Finkelstein*, requires affirmance here because, in cases remanded under sentence four of § 405(g), the district court order is "final' and, thus, by default, only the administrative decision on remand, can create finality for EAJA purposes. The fatal flaw in this argument is that it fails to look to the language of the EAJA and its legislative history, *i.e.*, it ignores Congressional intent on the precise point now before this Court, relying instead on a precedent concerning appealability of a narrow class of district court orders. Moreover, *Finkelstein* declined to limit *Hudson* in the way that the Secretary suggests here, noting that, although a sentence-four case may be over for appellate purposes after remand, it is not over for EAJA purposes. 110 S.Ct. at 2666; *see also id.* at 2665 n.8 (suggesting continuing vitality of 1985 legislative history and *Guthrie* for EAJA purposes).[4]

This discussion underscores the impossibility of applying *Finkelstein* to EAJA timeliness questions. *Finkelstein* held that a district court *judgment* issued under sentence four of § 405(g), not an agency decision, is a final, appealable order under § 1291. If *Finkelstein* is to "apply" here, therefore, the 30-day deadline would begin to run after entry of the final sentence-four remand order. This would, of course, totally eviscerate the EAJA in remand cases since the fee applicant is not yet a prevailing party at that point. *See Hudson*, 490 U.S. at 886; *see also Hanrahan v. Hampton*, 446 U.S. 754 (1980). Moreover, work performed in the administrative proceeding on remand would not be compensable for the simple reason that it has not yet taken place, thus undermining the very holding in *Hudson*.

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[4] Indeed, case law both before and after *Finkelstein* is critical of the decision below for its infidelity to *Hudson*. *See, e.g., Myers*, 916 F.2d at 679 n.20; *Smith v. Sullivan*, No. LR-C-89-138, 1991 U.S.Dist. LEXIS 1529 (E.D. Ark. Feb. 6, 1991); *Lewis v. Sullivan*, 752 F.Supp. 208, 210 (E.D. La. 1990); *Bradley*, 741 F.Supp. at 1464; *see also Seymore v. Sec'y of HHS*, 738 F. Supp. 235, 237 (N.D. Ohio 1990).

It is thus clear that *Finkelstein* cannot logically be applied to the EAJA without destroying the fee-shifting scheme contemplated by Congress and given full meaning by *Hudson*. 490 U.S. at 890 ("we find it difficult to ascribe to Congress an intent to throw the Social Security claimant a lifeline that it knew was a foot short"). *Finkelstein* simply does not relate to the EAJA, as the Court itself noted. 110 S.Ct. at 2666-67.

E. Even if the Secretary's Administrative Decision Might Constitute a "Final Judgment" in Some Cases, It Could Not Possibly Do So in This Case.

The Secretary's argument is built on the ruling in *Finkelstein* that district court remands under the fourth sentence of § 405(g), are final orders for appealability purposes under § 1291. Under sentence *four*, the court may remand the case for further administrative proceedings because of errors of law. *Finkelstein*, 110 S.Ct. at 2663-64. Under sentence *six*, however, the district court may remand the case for the taking of new evidence which is material to the claimant's application for benefits. *Id.* at 2664 (sentence six used when "district court learns of new evidence not in existence or available to the claimant at the time of the administrative proceeding"). As we discussed in our opening brief (Pet. Br. 31), the remand here was clearly based on sentence six. As the Secretary has conceded, new evidence suggesting that petitioner was disabled "was the basis for the Secretary's December 1984 request that the District Court remand the action to the Secretary." *See* Brief for Secretary at 5 (9th Cir. filed June 16, 1987).

When a case is remanded under sentence six, the Secretary

> *shall*, after the case is remanded, and after hearing . . . additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and *shall* file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

42 U.S.C. § 405(g) (emphasis added). Because the government did not comply with these responsibilities here, no post-remand order on the merits was entered.[5]

Although he does not, and cannot, claim that the remand was pursuant to sentence four, the Secretary states that the court exercised its "inherent authority" (Sec'y Br. 28 n.23), and issued an order "clearly contemplat[ing] that it was doing just what the district court did in *Finkelstein*" (Sec'y Br. 28). This is flatly incorrect because in *Finkelstein*, unlike here, the district court had made extensive findings and conclusions of law, one of which struck down a federal regulation. 110 S.Ct. at 2663. Nor would it matter if the district court here had believed that it was "terminating all judicial proceedings" (Sec'y Br. 28). In *Finkelstein*, the district court (and the Third Circuit) believed that the remand order was *not* a final order, 110 S.Ct. at 2662, but this Court disagreed; here, regardless of what the district court believed, the substance of its remand was under sentence six to consider new evidence.[6]

Perhaps realizing the difficulty of maintaining that this case was remanded under sentence four, the Secretary gratuitously suggests that "[t]here is much to commend the Ninth Circuit's approach even in a case remanded to the Secretary pursuant to the sixth sentence of Section 405(g)" (Sec'y Br. 29 n.24). We disagree.

[5] The U.S. Attorney was instructed to obtain an order of dismissal, but failed to do so (JA 17). Contrary to the Secretary's assertion (Sec'y Br. 18), the district court did enter a post-remand judgment in conjunction with its decision on fees (JA 22).

[6] Similarly, the Secretary's heavy reliance on the fact that the remand order was styled a "judgment" is of no import. As *Finkelstein* noted, it is the substance of the remand, not its name, that places the case in the sentence-six or sentence-four category. 110 S.Ct. at 2665 n.7. The Secretary also makes much of the fact that the district court's two-line remand order "did not cite the sixth sentence of Section 405(g)" (Sec'y Br. 28), but then on the very next page he recognizes that "many remand orders, like the one in this case are brief and are drafted without specific reference to particular provisions of Section 405(g)" (Sec'y Br. 29).

The mandatory submission of the record and post-remand review in sentence six cases is essential to the statutory framework because it represents the district court's first opportunity to review the administrative decision, as Congress directed it to do. *See Wilson v. Sullivan*, 751 F.Supp. 1281, 1285 (N.D. Ill. 1990); *see also Hudson*, 490 U.S. at 885-86. It is mere question-begging to suggest that the filing of the administrative record and transcript is superfluous "for situations in which [there is no] dispute regarding the claimant's eligibility" (JA 29 n.24), because these filings, which are otherwise within the Secretary's exclusive control, provide the *only* means, in a sentence-six case, to obtain further merits review of a decision that the *claimant* believes is not fully favorable. *Accord* A. Abraham & D. Kopelman, *Federal Social Security* 124 (American Law Institute 1979); Pet. Br., App. 2a, 4a (post-remand review, initiated by the Secretary, available in every case). Finally, a district court judgment, even if it is only a dismissal that, in effect, affirms a favorable administrative decision on remand, furnishes the *only* mechanism for enforcing the claimant's victory (*see supra* page 7).[7]

However, the simple answer to the Secretary's complaint that he should not have to make any post-remand filings is that it flies in the face of what Congress expressly mandated—that the Secretary return to district court after the completion of every sixth-sentence remand. If "there is little point" in this process (Sec'y Br. 29 n.24), it is for Congress, and not this Court, to rewrite the statute.

[7] Indeed, in sentence-four cases, where the government does not exercise its right to appeal, the district court obviously retains limited jurisdiction to enter a judgment upon a claimant-favorable administrative decision; otherwise the claimant would have no ability to enforce the decision which was obtained by virtue of § 405(g). As we have explained (Pet. Br. 34-38), jurisdiction to enter this type of judgment is explicit under 42 U.S.C. § 406(b).

F. The Secretary's Approach Creates Great Complexity and, Therefore, Would Engender Considerable Litigation.

Far from creating "a uniform, easily applied rule for all administrative and judicial orders" (Sec'y Br. 37), the Secretary's approach creates a series of rules that are difficult to discern in a particular case and which serve no purpose under the EAJA. First and foremost, even if the Secretary's reliance on *Finkelstein* is correct, the agency's decision on remand cannot trigger the EAJA filing deadline for cases remanded under sentence six, which are not final on the merits until the district court exercises the review contemplated by sentence seven. *See Buck v. Sec'y of HHS*, 923 F.2d 1200, 1205 (6th Cir. 1991) (*cited with approval in* Sec'y Br. 12). Thus, under the Secretary's theory, the district court will be forced "to distinguish between different kinds of remands [and] constru[e] sometimes ambiguous district court orders" (Sec'y Br. 29 n.24).[8]

Furthermore, it remains entirely unclear when an EAJA petition should be filed in cases involving hybrid fourth-sentence/sixth-sentence remands, as was true in three of the four cases considered in *Myers*. *See* 916 F.2d at 678 n.19. The solution for this morass is simple: not abrogation of sentence six of § 405(g), as the Secretary suggests (Sec'y Br. 29 n.24), but rather a ruling that, in all cases, the EAJA's statute of limitations commences only upon the entry of a court judgment.

In addition, the Secretary and the Ninth Circuit concede that the EAJA's limitations period should run from the district court judgment, even in remand cases, when

[8] *See Myers*, 916 F.2d at 677 n.18; *Wilson*, 751 F.Supp. at 1287 (where district court denied cross motions for summary judgment, and remanded for ALJ to more fully develop record, case was remanded under sentence six); *compare Finkelstein*, 110 S.Ct. at 2665 n.8 ("far from clear that *Guthrie* did not involve a sixth-sentence remand"), *with Wilson*, 751 F.Supp. at 1286 ("Both [*Guthrie* and *Brown*] clearly were discussing sixth sentence remands").

a post-remand court order is actually issued (Sec'y Br. 32 n.27; JA 31, *distinguishing Papazian v. Bowen*, 856 F.2d 1455 (9th Cir. 1988)). In making this concession, the Secretary distinguishes *Myers v. Sullivan*, 916 F.2d 659, from the present case, on the ground that there "the Secretary's decision on remand in fact was filed with the district court, and the district court then entered an order disposing of the case" (Sec'y Br. 32 n.27). This acknowledgment, which seems fair because it comports with § 405(g), at least in sentence six cases, only adds to the confusion. If the Appeals Council issues a decision which becomes "final," and thereafter the Secretary files that decision and the court enters a final order, does the administrative decision trigger the limitations period, or is the limitations period revived by the entry of the district court order?[9] If, instead, the district court order is entered within the 65 days that the Secretary now believes must pass before the administrative becomes final (Sec'y Br. 35-37), does it trump the administrative decision, or may the claimant still file for fees based on the later date of the agency ruling? The Secretary's apparent support for *Myers* and the Ninth Circuit's continued adherence to *Papazian* (JA 32), do not begin to answer these questions.

Thus, the Secretary's position promises more litigation, more uncertainty, and, most significantly, no increased fidelity to the will of Congress. Moreover, the primary purposes of the EAJA—to encourage ordinary citizens to challenge oppressive government conduct and to shape its future conduct, *Commissioner, INS v. Jean*, 110 S.Ct. 2316, 2322 & n.14 (1990)—would be seriously disserved by the spectrum of unpredictable rules urged by the Secretary. On the other hand, petitioner's position provides one rule for all remand cases, thereby eliminating

[9] In three of the four cases in *Myers*, the district court order was entered after the administrative decision on remand became final, with one order being entered more than two years after the Appeals Council decision, to which the Secretary made no objection. 916 F.2d at 661-64.

most, if not all, EAJA timing disputes and allowing the courts to devote their resources to better purposes.

II. THE NINTH CIRCUIT'S RULING SHOULD NOT BE APPLIED IN THIS CASE.

Even if the Court finds that an Appeals Council decision can constitute a "judgment" under the EAJA, that ruling should apply prospectively only. *See Chevron Oil v. Huson*, 404 U.S. 97 (1971). The Secretary seeks to avoid application of *Chevron Oil* by arguing that the EAJA's 30-day filing period is jurisdictional, thus precluding a non-retroactive decision in this case. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981). However, *Irwin v. Veterans Administration*, 111 S.Ct. 453 (1990), ruled that, unless Congress expressly provides otherwise, filing periods for suits against the government are not jurisdictional. In response, the Secretary contends that, because the EAJA states that a party "shall" file an attorney's fee application within 30 days of final judgment, the 30-day limit is an absolute bar. But *Irwin* expressly held the opposite—a statute is not jurisdictional based on its use of assertedly mandatory language such as "shall," because such an approach "would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 457.[10]

[10] The Secretary's use of "legislative history" (Sec'y Br. 46), indicating that the 30-day period is jurisdictional, is misleading. The committee report cited, S.Rep. No. 856, 98th Cong., 2d Sess. 16 (1984), was prepared for a version of the EAJA that was vetoed by the President. *Cf. Finkelstein*, 110 S.Ct. at 2667 (Scalia, J., concurring). The inherent unreliability of such a report is underscored here because there is much more in-depth legislative history accompanying the bill that actually became law and that excludes the earlier language concerning the purportedly jurisdictional nature of the limitations period. *See* H.R. Rep. No. 120, Pt. I, *supra* at 19-20; H.R. Rep. No. 120, Pt. II, *supra* at 6 & n.26. Indeed, it would be anomalous for Congress to have made the filing deadline strictly jurisdictional, while at the same time urging that it not be construed in an "overly technical" manner as a "trap for the unwary." *Id.*

The Secretary also maintains that petitioner is not entitled to relief under *Chevron Oil* because he seeks shelter from the ruling in *this case*, not from the application of adverse precedent in another case (Sec'y Br. 43). The Secretary does not explain, however, why this purported distinction ought to make a difference. To the contrary, petitioner is no less deserving of protection from an abrupt, wholly unpredictable change in the law than are other claimants whose EAJA petitions are pending in the Ninth Circuit and who, the Secretary concedes (Sec'y Br. 44 & n.36), may well be able to argue for the non-retroactive application of the decision below. Moreover, the Secretary's improbable argument that *Finkelstein*, decided approximately five years after the Appeals Council's decision in petitioner's favor, requires reversal here, is indistinguishable from the prospective application of *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), granted in *Chevron Oil*. There is thus no question that the *Chevron Oil* test must be considered.

Turning to the first factor, the Secretary suggests that the decision below did not overrule clear precedent because only two decisions prior to the 1985 amendment—*Guthrie* and *Brown v. Sec'y of HHS*, 747 F.2d 878 (3d Cir. 1984)—"suggested a contrary rule" (Sec'y Br. 47), and that the amendment evinced an abrupt turnabout on this issue. This is incorrect on its own terms because there was other pre-reenactment authority consistent with *Guthrie* and *Brown*, and, perhaps more importantly, there was none suggesting otherwise.[11] In addition, the Secretary does not mention that, in June 1985, when petitioner failed to divine that the Appeals Council's decision was a "judgment" which might trigger the statute of limitations, the EAJA had not yet been reenacted.

[11] *See, e.g., Taylor v. Heckler*, 778 F.2d 674, 678 & n.4 (11th Cir. 1985) (decided on basis of pre-reenactment law, but noting that 1985 legislative history "supports our holding in this case"); *Alexander*, 612 F.Supp. at 272; *Baily v. Heckler*, 580 F.Supp. 33, 34 (W.D.N.C. 1984).

Thus, the nationwide practice requiring a district court judgment to commence the 30-day period, which the Secretary had promised to abide by in *Brown*, was the law at the only time relevant to the retroactivity inquiry. *See American Trucking Assn's v. Smith*, 110 S.Ct. 2323, 2336 (1990) (plurality opinion).

Moreover, even if post-1985 developments were relevant, it is pure fiction to suggest that the law changed prior to the decision below. As a threshold matter, the Secretary's position on retroactivity—that *petitioner* should have foreseen the Ninth Circuit's decision—is a little more than ironic, since *he* has now disavowed the Ninth Circuit's view as to when an EAJA application is timely (Sec'y Br. 35-37), although he fully supported that view in his opposition (Opp. 7-8). As we discussed in our opening brief (Pet. Br. 43 & n.10), prior to the decision below, *every* post-reenactment precedent, except for a 1988 district court decision based on a faulty reading of Eighth Circuit law, either implicitly or explicitly rejected any notion that the Secretary's administrative decisions could commence the 30-day statute of limitations.[12] Finally, the Secretary's contention that the Ninth Circuit ruling did not establish new law is especially hollow in light of the fact that the Secretary *still* informs every claimant that he will file the post-remand decision and administrative record with the court for further judicial action (Pet. Br., App. 2a, 4a).

Petitioner's opening brief fully demonstrates why retrotractive application would produce substantially inequitable results for both petitioner and others similarly situated (Pet. Br. 47-48). But we cannot let pass the Secretary's response, which goes far afield from the proper inquiry, and instead attacks the supposed failure to file a fee application until May 1986, about eight

[12] *See Hudson*, 490 U.S. at 886-87 (approving *Taylor*, *Brown*, and *Guthrie*); *see also, e.g., Papazian*, 856 F.2d 1455; *Celeste v. Sullivan*, 734 F.Supp. 1009, 1010 (S.D. Fla. 1990); *Derby v. Bowen*, 636 F.Supp. 803, 805 (E.D. Wash. 1986); *Aldrich v. Heckler*, 609 F.Supp. 863, 864 (D. Me. 1985).

months after petitioner was finally paid disability benefits (JA 24). This charge has nothing to do with the inequity prong of *Chevron Oil*, but rather begs the question under the first prong—whether the decision worked a change in the law. If the Secretary had wanted a final judgment for EAJA purposes, it was his responsibility to file the administrative decision after remand. Although the U.S. Attorney was instructed to do so in this case, he did not, and petitioner therefore moved for fees and informed the court of the outcome of the administrative proceedings. Indeed, the Secretary concedes that it was, and still is, his policy to make post-remand filings in all cases, admitting only that he "does not propose to continue the practice of making such post-remand filings as a general matter" if he prevails here (Sec'y Br. 31 n.26). Yet, incredibly, the Secretary faults petitioner for conduct fully consistent with his own policies.[13]

This sequence of events fully supports our claim that erecting a new time bar to EAJA fees is inequitable in this case, where petitioner's attorney had provided three years of representation to an indigent SSI claimant. Moreover, as we have shown (Pet. Br. 48), retroactive application of the theory now espoused by the Secretary would be extremely unfair to many EAJA applicants, not their attorneys, who may lose significant amounts of benefits under 42 U.S.C. § 406(b) and who, to this day, still are informed by the Secretary that he will make

[13] The Secretary attempts to excuse the U.S. Attorney's failure in this case to inform the district court of the administrative decision because the Secretary's form directed the U.S. Attorney to dismiss the case "if appropriate." If one reads the whole form, however, it is clear that the U.S. Attorney was supposed to report to the court in every case, although it may have been not "appropriate" to *dismiss* every case after remand, because the decision was only "partially favorable," or because the "supplemental transcript or the record" had not yet been prepared (J.A. 17). Indeed, even in cases where "the plaintiff [did] not wish to continue with the litigation," the U.S. Attorney was directed to "obtain an order of dismissal" (JA 18).

post-remand filings and obtain a judgment in every case (Pet. Br., App. 2a, 4a).

The best answer to the retroactivity question, however, is that it should not be reached because petitioner's EAJA application was timely filed. Although in most court-remanded cases, the desire for compensation provides adequate incentive for the prevailing party to seek an EAJA fee within a reasonable time, if the Secretary wants the 30-day filing period to commence, he is free to obtain a final district court judgment, as he is required to do in cases remanded under the sixth sentence of § 405(g). This simple procedure provides one readily discernible statute of limitations for every remanded case, in the social security area as well as in every other administrative context.

CONCLUSION

For the reasons stated above and in petitioner's opening brief, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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